In the United States

Circuit Court of Appeals

For the Ninth Circuit

EBNER GOLD MINING COMPANY,
(a corporation) Plaintiff in Error

vs.

ALASKA-JUNEAU MINING COMPANY,
(a corporation) Defendant in Error

No. 2155

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Brief of Plaintiff in Error

JNO. R. WINN and
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Attorneys for Appellant in Error

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MINERS' CUSTOMS.

POSSESSION SUFFICIENT TO MAINTAIN ACTION IN EJECTMENT AGAINST MERE INTRUDER.

STATEMENT OF CASE

This action was brought in the District Court for the District of Alaska, Division No. 1, for the purpose of ejecting the defendant in error from three specific lode mining claims, and the amended complaint in this respect sets up three causes of action.

The first cause of action contains the ordinary allegations of a complaint in ejectment, stating that both the plaintiff in error and the defendant in error are corporations, etc., and that the plaintiff in error was, at the time of the commencement of the action, and had been for several years prior thereto, seized in fee, possessed and entitled to possession of a certain patented lode mining claim known as the Lotta lode, situated in Harris Mining District, District of Alaska; that while plaintiff in error was so seized, the defendant in error, sometime in August, 1910, and before the commencement of the action, without right or title, entered into the wrongful possession of part of the Lotta lode claim and ousted and ejected the plaintiff in error therefrom and wrongfully withheld the possession thereof, and that the defendant in error was engaged in building a dam and constructing a flume line upon, across and over said Lotta lode claim.

The second cause of action is predicated on plaintiff in error being seized, possessed, entitled to the possession and the owner by discovery, location, staking and marking of the boundaries, recording by its grantors and doing and performing of the annual assessment work on the Parish No. 2 lode mining claim and the ouster of plaintiff in error therefrom by the defendant in error in entering thereon and the building and constructing over and across the same a dam and flume line and unlawfully and wrongfully withholding the possession thereof.

The third cause of action was at the request of the plaintiff in error dismissed without prejudice during the course of the trial of the case. (P. R. 79.)

The defendant in error, by its answer, denies all of the material allegations of the amended complaint, except that the defendant in error is a corporation; and the defendant in error further claims that one J. P. Corbus, in the month of October, 1899, located what is known as the Oregon claim and that one R. G. Datson, on July 20, 1910, made a mineral location of virtually the same ground contained in the location made by Corbus, and on the 8th day of October, 1910, one W. R. Lindsay, made a location of a certain vein known as the Canyon vein or lode and that all the said parties thereafter conveyed said locations to the defendant in error. Defendant in error further claims that the dam and flume line complained of in the amended complaint were being constructed, or were con-

structed, upon the said Oregon and Canyon lode mining claims, which said claims conflict with the Lotta patented claim and the Parish No. 2 claim, described in the amended complaint.

The defense that there was another action pending wherein the same subject matter was in dispute was waived or withdrawn (P. R. p. 77). And the defendant in error also claims in its answer that it is the owner of another mining claim termed the Colorado patented mining claim, lying contiguous or adjacent to the Lotta or Parish No. 2, or what defendant in error terms the Oregon and Canyon lode claims. However, so far as this Colorado claim is concerned, it does not, in our judgment, in any wise affect this case as it is before the appellate court. The defendant in error proceeds to further answer the second cause of action set out in the amended complaint, which said cause of action concerns the title to the Parish No. 2 unpatented lode claim, substantially claiming that it has been engaged in the mining business in Alaska for some years and is the owner of a group of mining claims consisting of 31 patented and several unpatented claims, all situate in Silver Bow Basin, Alaska, contiguous or adjacent to the mining claims of the plaintiff in error set out and described in the amended complaint; and that it had for several years been engaged in extracting gold from these mining claims, erecting mills, constructing tunnels, etc., for the developing and mining of said property, and that it still contemplated the

further development and opening up of said mining claims on an enlarged scale and building a 200-stamp mill on the shore of Gastineau Channel, near Juneau, Alaska, which is something over a mile from its Colorado mining claim, and that it proposed to build a tramway from its Colorado mining claim to its mill and that its tramway would connect with a tunnel to be driven commencing on the Colorado claim and running through its various mining claims, and that it was seeking to take the water from Gold Creek from its dam, which is partly constructed upon the Lotta and Parish No. 2 lode mining claims, being the claims in dispute, and convey by a flume, pipe line, etc., to its mill to be erected on Gastineau Channel, to be there applied to generate power, etc., for the running of the mill; and looking towards the appropriation of said water, had caused one L. D. Mulligan and R. A. Kinzie, the latter being the agent and general superintendent of the defendant in error, to post certain water location notices, one of which said water location notices was posted on the Lotta patented lode mining claim and the other on that claim or close to the common side line of the Lotta and the Parish No. 2 claim.

These statements or allegations in the answer of the defendant in error appear to be set up as a defense or excuse for entering upon the Lotta and Parish No. 2 claims. The defendant in error then proceeds to set up some minutes of a meeting of miners in the Harris Mining District held in 1882 with reference to the appropriation of water. (P. R. pp 40-

41) And further claiming that the work that it was doing in no wise damaged the premises upon which the dam was built or the flume crossed, and claiming that said structures in no wise interfered with the use of the ground upon which the same was constructed or crossed for mining purposes. All of these excuses or pretended justification for entering upon the Lotta patented or Parish No. 2 unpatented claims are embraced in what the defendant in error terms its further answer to the second cause of action, that is, its answer to plaintiff in error's second cause of action, which concerns the title to Parish No. 2 mining claim, and commences near the bottom of page 28 of the record and continues to about the middle of page 45 of the record.

A motion was served and filed by the plaintiff in error on May 15, 1911, to strike each and all of the allegations, paragraphs and matters contained in said further answer to the second cause of action stated in the said amended complaint, for the reason and on the ground that each and all of the matters set up in each and all of the paragraphs of said further answer, and facts contained therein, were irrelevant and immaterial and that said allegations and facts set forth in said paragraphs of the said further answer to said second cause of action in the amended complaint constituted no defense to the matters complained of by the plaintiff in error. The motion in question is found on pages 45 to 48 inclusive of the record, and the court's order over-ruling and deny-

ing the motion is found at pages 48 and 49 of the record.

The plaintiff in error then served and filed a demurrer to the said further answer to the second cause of action stated in the amended complaint on the ground and for the reason that the matters and facts therein alleged and contained did not state a defense to the matters and facts set forth in the said second cause of action of said amended complaint, which said demurrer was over-ruled by the court. (P. R. pp. 49 to 51 inclusive.)

Plaintiff in error duly excepted to the ruling of the court in denying the motion and over-ruling the demurrer.

The plaintiff in error being thus forced to reply to these several matters set up by the defendant in error, claims that if J. P. Corbus ever undertook to make a location of what is termed the Oregon lode claim (which covers a part of the Lotta and a part of the Parish No. 2 claims) that it was to be located on behalf, and for the benefit, of defendant in error, and that any such attempted location was a subsequent location to the Lotta and Parish No. 2 lode claims, and made while the plaintiff in error or its grantors were in possession of said Lotta and Parish No. 2 lode claims, and that neither the said Corbus or his grantees had ever done any assessment work on said Oregon claim and that said claim had been abandoned and forfeited. Also, that if said Datson, who it is claimed made a second location of said Oregon claim in 1910, did make a location at

said time, it was on behalf, and for the benefit, of the defendant in error, and further that the same was made over and upon the Lotta and Parish No. 2 mining claims, the latter being prior locations of the plaintiff in error or its grantors, and for this reason the Datson location was void and of no effect and simply made to harass and annoy the plaintiff in error.

In regard to the Lindsay location of the Canyon lode mining claim, such attempted location was made by him on behalf of the defendant in error, and was made in, over, and upon the ground contained in the patented Lotta claim and Parish No. 2 unpatented claim while the said two latter mentioned claims were valid subsisting claims owned and possessed by the plaintiff in error; and, further, that part of said Canyon claim covers a part of the J. P. Corbus location of the Oregon claim and was invalid. It is denied that the miners' rules and regulations set forth in the answer were ever in force or effect, or that if they were in force or effect at the time that the plaintiff in error initiated its rights to the property in controversy they were repealed by the Act of May 17, 1884, being an Act entitled

> "An Act Providing a Civil Government for Alaska," 23 Stats. at Large, which provided for the reorganization of a civil government in Alaska, the extension thereof of the laws of Oregon and in Section 8 as follows *"And the laws of the United States relating to mining claims and the rights incident thereto shall,*

from and after the passage of the Act, be in full force and effect," etc.

And further alleges that if said rules and regulations ever existed, that they were inconsistent with said law and had fallen into disuse and had been abandoned, and never had been recognized by the Courts of Alaska since either party to this action made any claim to the property in dispute.

The plaintiff in error further claims in its reply that it has been in existence since the year 1895 and that since said time has been the owner and in possession of a group of quartz mining claims in what is termed Harris Mining District, on Gold Creek, near Juneau, Alaska. That all of said claims are contiguous and adjacent to each other and that among that group of claims are the Lotta and Parish No. 2 lode claims; that Gold Creek flows through and across the said group of mining claims and particularly the Lotta and Parish No. 2 lode claims. That before the plaintiff in error became the owner of this group of claims, its grantors or predecessors in interest had erected on one of the mill sites belonging to the group and near the upper end thereof a 10-stamp mill and had been engaged several years, before the plaintiff in error became the owner of the property, in opening up, developing and mining said mining claims; and in order to generate power for running said mill and mining property, had used the water of Gold Creek by diverting the same from said creek just above the 10-stamp mill. That in 1895 all of the above mentioned group of mining

claims were transferred to the plaintiff in error except a few locations that were made since that date, and among the locations made since that date is the Parish No. 2 claim, the claim in controversy, which was located by one William M. Ebner, on the 24th day of October, 1899, and afterwards, to-wit: on March 29, 1906, was conveyed by the said Ebner to the plaintiff in error, and since said time the said last mentioned claim has formed a part of the group in question; that since 1895 the plaintiff in error has been continuously engaged in opening up, developing and mining the property above referred to and the 10-stamp mill has been changed to a 15-stamp mill, and the necessary ore bunkers, air-compressors, machinery, etc., placed on said mines in good workmanlike style and the water of Gold Creek used for generating all of the power that was used in the mining and milling of the ores taken from said mines.

That on the 20th day of June, 1910, in contemplation of the enlarging and increasing the facilities to open up, develop and mine said property, one H. T. Tripp on behalf of said plaintiff in error located an additional 10,000 miners' inches of water of said Gold Creek to be diverted therefrom at a point on the creek near the point of the first diversion, and to be conveyed by ditch, flume and pipeline along the bank of said creek and conveyed to the mill site or place to where the 200-stamp mill was to be erected, as last above referred to, and applied and used for the developing, mining and milling of the ores to be

taken from said group of mining claims, which said location is prior to the locations made by defendant in error.

That immediately after the making of the location of the water by Tripp, the plaintiff in error commenced actual work looking towards the carrying out of the above mentioned plans for the opening up and developing of said property and mining the same on an enlarged plan.

That long before the commencement of this action, in order tocarry out the plans for increasing the out-put of said mines, the said plaintiff in error had surveyed and laid out a proposed working tunnel, which said working tunnel and mill site upon which the proposed 200-stamp mill is to be built are indicated upon the maps and plats introduced herein, one of which is found at page 1858 of the record marked "Defendant's Exhibit, No. 3," for identification in cause No. 835-A, and "Plaintiff's Exhibit, No. 1," in cause No. 803-A, and another marked "Plaintiff's Exhibit N," page 1850. These maps or plats also show what has been referred to as the group of mining claims belonging to the plaintiff in error and indicate the place where the tunnel crosses the Parish No. 2 and Lotta lode claims; also, the new flume that was built for the conveying of water from Gold Creek to the new mill site where the proposed 200-stamp mill is to be erected, and contains other data which will be referred to more particularly in the argument of this case.

The said mill site and tunnel route were selected

by the plaintiff in error long prior to the time that the defendant in error or its grantors made any pretended water location on Gold Creek or any pretended location of the Oregon or Canyon lode claims.

That on or about the ———— day of ———— 1910, while plaintiff in error's work was in progress, as above stated, the defendant in error attempted wrongfully to enter upon the Lotta patented and Parish No. 2 unpatented mining claims and take possession of a part of each against the will and consent of the Plaintiff in error; and in order to prevent such wrongful entry and trespass, the plaintiff in error commenced a suit in the district court for the District of Alaska, Division No. 1, Cause No. 803-A, and made application for a temporary restraining order restraining the said defendant in error from trespassing upon the Lotta and Parish No. 2 mining claims; that upon the hearing thereof, the court refused said restraining order upon the ground that there was a dispute as to the title to the property in controversy and that the plaintiff in error could suffer no irreparable damages by reason of the acts complained of and that plaintiff's remedy would be by an action in ejectment; hence, the filing of this suit.

That after refusal of the court to grant said temporary restraining order, the plaintiff in error continued its work that had already been begun on the Lotta and Parish No. 2 lode claims, and the said defendant in error continued making forcible entries upon said Lotta and Parish No. 2 mining

claims, and by force and by resorting to the issuance of warrants and continuous arrests of the employees of the plaintiff in error, defendant in error succeeded in constructing its dam and flume line in, over and upon the said Lotta and Parish No. 2 mining claims and ousted the plaintiff in error therefrom.

By agreement of the parties to this action, a jury was waived and the case went to trial before the court on the first and second causes of action set forth in the amended complaint and the answer of the defendant in error and the reply of the plaintiff in error.

Upon the trial of said cause, the defendant in error offered evidence to substantiate the matters, facts and allegations set up in its further answer to the second cause of action set forth in the amended complaint, which said further answer commences at or near the bottom of page 28 and extends to page 45 of the record; and all of the testimony and evidence that was offered by the defendant in error in proof of the allegations contained in said further answer, was permitted to go in over the objections made by the plaintiff in error, and to such ruling made by the trial court an exception was allowed. (P. R. 1073 and 1083.)

At the close of the trial of the case, and after the submission of all testimony and evidence on behalf of both of the parties to the action, plaintiff in error made its application to the court to amend its answer on page four thereof by setting up a further defense of forfeiture of the Parish No. 2 lode min-

ing claim set out and described and constituting the subject matter of litigation contained in the second cause of action of the amended complaint. The said further defense is found at pages 81 and 82 of the record. The plaintiff in error objected to said proposed amendment for the reason that it constituted a new, separate and distinct defense to the second cause of action contained in the amended complaint, and that such amendment could not be made and especially after all the evidence had been introduced in said cause, and that a plea of forfeiture was affirmative defense and if defendant in error desired to avail itself of such defense, it should have been set up in the answer in the first place and that plaintiff in error was taken by surprise by such offer or amendment, and after the argument of said objections, which were made in open court, the court made an order over-ruling said objections and permitting the setting up of said further defense of forfeiture (P. R. p. 83.)

The amendment in question is also found at page 24 of the record and is termed "2d-b."

After argument of said cause before the court on both questions of law and fact, the same was submitted to the court. On account of said cause being tried before Hon. Edward E. Cushman, who departed immediately after said trial to Fairbanks, Alaska, the following order was made by the court:

> *"It being orally stipulated by counsel that the files in this cause may be transferred from the First to the Fourth Division, that the Court*

may there settle the findings and make and enter judgment and rule upon the findings requested by either side; the papers to be then returned to the Clerk's office of the First Division for the final entry of judgment; that each side be allowed thirty (30) *days from the return of findings and judgment to the office of the Clerk of the court of the First Division, within which to prepare and file their written exceptions to such findings, judgment and decree; the Clerk to notify the attorneys of record on each side of the date of filing such findings, judgment and decree. That each side be allowed six* (6) *months from the date of the filing of the judgment in which to prepare, serve and file proposed bill of exceptions, if appeal or writ of error is desired to be sued out by either of such parties.*

Upon such stipulation it is so ordered by Court. Done in open court this 12*th day of June,* 1911.

EDWARD E. CUSHMAN, Judge."

That within the time required by law and the order of said court, findings of fact and conclusions of law by the respective parties were prepared and submitted to the court. The proposed findings of fact and conclusions of law of the plaintiff in error are found in the record at pages 1674 to 1677 inclusive, and pages 1677 to 1679 inclusive.

That on the 5th day of July, 1911, at Fairbanks, Alaska, the court made its order denying the findings so offered, tendered and requested by the plaintiff in error other than those given in the findings

which were made by the court, to which ruling of the court plaintiff in error excepted and the exception was allowed. (P. R. p. 1678.)

The Court then proceeded and made its own findings of fact and conclusions of law, the same being set forth in Vol. 1, of the record, pp. 85 to 91 inclusive. Immediately thereafter, and within the time required by law, the plaintiff in error filed its motion to set aside the findings of fact and conclusions of law so made and entered by the court, in so far as the same in any wise affected the Parish No. 2 lode mining claim, or the ownership of said mining claim by the plaintiff in error or the right, title and interest of the plaintiff in error to said minng claim, and to grant the plaintiff in error a new trial of its its second cause of action set out in its amended complaint. That thereafter, on the 5th and 7th days of July, 1911, the court made its separate orders over-ruling and denying said motion, which said orders are found at pages 1695 and 1696 of the record, to which orders of the court so made plaintiff in error was allowed an exception.

That on the 5th day of July, 1911, the court rendered its judgment or decree herein wherein and by the terms of which it ordered, adjudged, considered and decreed that the plaintiff have and recover of and from the defendant the possession of the said Lotta lode mining claim, according to the boundaries thereof, as set up in the amended complaint, and said court further considered, ordered, adjudged and decreed that plaintiff take nothing by its amend-

ed complaint except as to the Lotta lode mining claim, and the cause of action termed the second cause of action, appertaining to the Parish No. 2 lode mining claim was by said judgment or decree dismissed, to which ruling of the court pertaining to the said second cause of action, the plaintiff in error asked and was allowed an exception. (P. R. pp. 92-94.)

That within the time prescribed by the order of the court and stipulation of the attorneys representing the respective parties, the plaintiff in error filed its exceptions to the findings of fact and conclusions of law made by the court and those offered by the plaintiff and refused or modified by the court in so far as the same affected Parish No. 2 lode claim, and also included in said exceptions an exception to the action of the court in dismissing said second cause of action set up in the amended complaint and of which the Parish No. 2 lode mining claim is the subject matter of litigation. (P. R. pp. 1687-1692.)

Since the court adjudged the plaintiff in error to be the owner of, entitled, etc., to the possession of the Lotta lode mining claim, and that there is no cross appeal filed herein by the defendant in error, the only matter for the consideration of the court is as to the Parish No. 2 lode mining claim.

The writ of error in this case is prosecuted by the plaintiff in error from the findings and conclusions made by the trial court, the order of the court refusing to sign findings of fact and conclusions of

law tendered and offered by the plaintiff in error, the order over-ruling the motion for new trial in so far as the same, and each and all of the same, apply to the Parish No. 2 lode mining claim, and from that part of the judgment and decree of the trial court made and entered herein dismissing the second cause of action in the amended complaint, of which the last mentioned mining claim was the subject matter of litigation.

We believe the foregoing to be a full, true and complete statement of the case.

SPECIFICATIONS OF ERROR

I.

The Court erred in over-ruling and denying plaintiff's motion to strike from defendant's answer all those portions of the same and each and every part thereof moved against in the motion of plaintiff filed herein on May 15, 1911.

II.

The Court erred in over-ruling plaintiff's demurrer to the defendant's further answer to the second cause of action stated in the amended complaint, and also plaintiff's demurrer to defendant's answer to the third cause of action stated in the amended complaint; which said demurrer is filed herein on May 16, 1911.

III.

The Court erred in allowing the defendant herein after the trial of said cause to amend its answer

herein by pleading a noncompliance of plaintiff in performing the annual assessment work upon the Parish No. 2 lode mining claim, and pleading a forfeiture thereof; which said amendment was filed on June 9th, 1911.

IV.

The Court erred in permitting the defendant upon the trial case of said cause, over the objections of the plaintiff, to introduce evidence with reference to the appropriation and acquisition of water and water rights and the conveying of such water by flume, pipe, or ditch line across mining claims and real estate of others and conveying such water to the place of use or intended use of such appropriator. The introduction of such evidence and testimony to establish any such custom among miners of Southeastern Alaska, and in Harris Mining District, was all admitted over the objections and exceptions of the plaintiff.

V.

The Court erred in not making, signing and filing the following findings of fact and conclusions of law offered and tendered by the plaintiff herein respecting Parish No. 2 lode mining claim, to-wit:

Finding No. 4 offered and tendered by plaintiff herein, which said finding is substantially as follows:

> *"That the plaintiff is now and has been for several years past, seized, possessed and entitled to the possession and the owner by discovery, location, staking and marking of the*

boundaries and recording by its grantors and predecessors in interest and by a full compliance with the laws of the United States, and doing and performing of the annual assessment work each and every year of the Parish No. 2 lode mining claim," etc.

And in not making and signing and filing Finding No. 5, offered and tendered by plaintiff, which requests the Court to find:

"That while plaintiff was so seized and possessed and entitled to the possession of the Parish No. 2 lode mining claim, the defendent some time in the month of August, 1910, *and before the commencement of this action, without right or title, entered into possession of part of Parish No. 2 lode mining claim and ousted and ejected plaintiff therefrom, and now unlawfully and wrongfully withholds the possession thereof from the plaintiff."*

And in not making, signing and filing Finding No. 6, offered and tendered by the plaintiff herein, which is substantially as follows:

"The Court further finds that at the time of the commencement of this action and for several years prior thereto the plaintiff was the owner and entitled to the possession of said Parish No. 2 lode mining claim as against the defendant and all persons and corporations whomsoever, and all of the surface ground thereof."

The Court also erred in not making the Find-

ings of Fact tendered and requested by plaintiff which are as follows:

(*a*) *"The Court further finds that the annual assessment work and labor required by law has been done and performed upon the Parish No.* 2 *lode mining claim for the years* 1907, 1908, 1909 *and* 1910 *and within the time in each of said years required by law."*

(*b*) *"The Court further finds that the annual assessment work required by law has been done and performed upon the Parish No.* 2 *mining claim for the years* 1908, 1909 *and* 1910."

(*c*) *"The Court further finds that the annual assessment work and labor has been done and performed upon Parish No.* 2 *lode mining claims each and every year since its location in the year of* 1899."

VI.

The Court erred in not making, signing and filing Conclusions of Law No. 1 and 2 offered and tendered by plaintiff, which in substance requested the Court to conclude that the plaintiff was entitled to a writ of ejectment ejecting said defendant from Parish No. 2 lode mining claim, and granting a restraining order against the defendant restraining it from anywise interfering with plaintiff's possession of Parish No. 2 lode mining claim.

VII.

The Court erred in making and rendering its Finding No. 5, which is as follows:

"That the plaintiff is not and never has been seized, or entitled to the possession of that certain tract of ground described in paragraph III. of the plaintiff's second cause of action, set forth in the amended complaint herein and known and referred to as Parish No. 2 lode mining claim. That the ground claimed by the plaintiff as Parish No. 2 lode mining claim, was located solely for purposes of convenience; that no discovery of mineral-bearing rock in place of any value was ever made by the plaintiff or its grantors, nor any indication or evidence of such as could warrant or justify one in spending time, work, or money in its development or in the expectation of finding ore."

Also in making Finding No. 6, wherein the Court finds in substance that plaintiff did not, prior to the year 1909, perform the necessary assessment work on Parish No. 2 lode mining claim.

The Court also erred in making all that part of Finding No. 7 in which it finds that the defendant proceeded to erect a part of a dam on the public domain and that at said time the property described in Parish No. 2 lode mining claim was a part of the unoccupied and unsegregated public domain of the United States. All of which said findings were against law and without any evidence to support the same, and in many respects against all of the evidence in said cause and against the admitted facts

by both plaintiff and defendant in the pleadings and upon the trial and hearing of said cause.

VIII.

The Court further erred in making the following findings: Finding No. 8, in which the Court finds in substance that under the custom of miners of Harris Mining District, being the district in which Parish No. 2 lode mining claim is located, that appropriators of water had uniformly the right to build ditches, etc., across unpatented mining claims owned and held by other persons, etc.; and also Finding No. 9, in which the Court finds substantially that under the custom of miners the riparian propriator has no right to the use of water of running streams by reason of such riparian ownership, as against a prior appropriator, and that the defendant went upon Parish No. 2 lode mining claim to construct a dam, etc., for the purpose of diverting and appropriating the water to be used in running of a stamp mill, etc.; for the reason that each and all of said findings are against law, unsupported by the evidence, and against the great preponderance of evidence and against the uncontradicted facts in the case.

IX.

The Court erred in making his Conclusion No. 3, which reads as follows:

> "*That the location known as Parish No. 2 lode mining claim is void and of no effect.*"

Said conclusion is without any evidence to sup-

port the same. The Court further erred in making Conclusion No. 5, which reads as follows:

"The Court further concludes that neither of the parties is entitled to recover costs in this suit." For the reason that said conclusion is unsupported by the evidence and against law—the Court having granted affirmative relief to the plaintiff and adjudged it to be the owner of the Lotta lode mining claim set forth and described in the first cause of action in the amended complaint, and by reason of this the plaintiff was entitled to recover its costs in said action.

X.

The Court erred in that part of the judgment and decree in said cause wherein it adjudged and decreed as follows:

"It is further considered, ordered, adjudged and decreed that the plaintiff take nothing further by its complaint herein and except as to the Lotta lode mining claim, this cause and action be dismissed without costs to either side."

XI.

The Court erred in over-ruling the motion of plaintiff for new trial herein.

XII.

The Court erred in not signing, settling and allowing the bill of exceptions presented for said purpose on the 23rd. day of May, 1912. (P. R. pp. 117-123.)

ARGUMENT

We rely on the foregoing assignments of error to reverse the judgment and decision of the trial court and for a judgment in favor of the plaintiff in error upon its second cause of action or the granting of a new trial herein, but in the consideration of said errors assigned will treat the same in a consolidated form.

I.

The court below erred in not sustaining plaintiff in error's motion to strike that portion of the answer of defendant in error referred to in the first paragraph of plaintiff in error's specification of errors; or if the trial court did not err in not sustaining said motion to strike, it did err in over-ruling plaintiff in error's demurrer to said further answer of the defendant in error.

This action was brought, and is, in the nature of a suit in ejectment, seeking to eject the defendant in error from two certain lode mining claims, the Lotta patented and the Parish No. 2 unpatented claims. The defendant in error denies all the material allegations of the amended complaint and sets up separately what appears to be several separate answers to the matters contained in the amended complaint, none of which said separate answers pretend to be in the nature of a *cross-complaint* nor are any of them termed an *affirmative defense*, but merely answers to the two causes of action set forth in the amended complaint. Said answers are, in short, as follows, to-wit:

(1) That defendant in error is the owner of the Oregon and Canyon lode mining claims, which said claims conflict with the Parish No. 2 lode mining claim, referred to in the second cause of action of the amended complaint.

(2) That defendant in error claims the right to certain waters of Gold Creek, located by one L. D. Mulligan and conveyed to the defendant in error, which said water it purposes conveying by flume over and across the Oregon and Canyon claims, conflicting with the Parish No. 2 lode mining claim, to the place upon which it intends to erect a stamp mill, etc.

(3) The further answer to the second cause of action pertaining to the Parish No. 2 lode mining claim in which the defendant in error claims some rights under what it terms certain miners' rules and regulations, which were adopted for what is known as the Harris Mining District, Alaska, in the year 1882, and that the property in controversy is within said mining district and that such miners' rules and regulations pertain to the location and diversion of water from streams on the public domain and the conveying of the same across public domain to place of use and are still in force and effect; and further claiming that according to the customs of miners, recognized and observed in the Harris Mining District, etc., the defendant in error has:

> *"A right to construct ditches and flumes to be used in connection with the diversion and conveying of water over and across the public*

*domain, as well as over unpatented lode or placer claims, and under such customs, each miner or person operating a mine had a right to go upon unpatented mining claims of others and construct ditches and flumes over and across the same for the purpose of diverting * * * * * * * * the water to the place of application for the use and some beneficial purpose."*

No affirmative relief is asked by the defendant in error. The answer simply prays that plaintiff's amended complaint may be dismissed, etc. (P. R. p. 45.)

And it is this further answer of the defendant in error to the amended complaint that is moved against, and to which said demurrer was filed. It is evident that the gist of the defendant in error's defense is that it is the owner by reason of its Oregon and Canyon locations to the ground over which its flume passes, as well as the place where the water is diverted from Gold Creek. We do not see how the pleading could be otherwise interpreted; the purpose of alleging the ownership in the first instance of the two Oregon locations was to establish title in the defendant in error to the conflicting area with the Parish No. 2 lode, and was particularly a matter of affirmative defense or cross-complaint, requiring the same particularity in pleading to show the said claims were valid, subsisting lode locations. Mor. Min. Rights, 14th Ed. 40. It is not necessary, however, to spend much time here in presenting our view pertaining to either of the Oregon locations or

the Canyon location, for the reason that the trial court made its findings in relation to these claims, which are as follows:

> *"The Court further finds that the Oregon mining claim referred to in defendant's answer as located by J. P. Corbus and the Oregon mining claim as located by R. G. Datson were each made solely for the purposes of convenience; that no discovery of mineral-bearing rock in place, of any value, was ever made by the defendant or its grantors, or at all, on either of said claims, nor any indication or evidence of such as would warrant or justify one in spending time, work or money in the development of either of such claims or with the expectation of finding ore.*
>
> *"The Court further finds that the Canyon mining claim is based upon a discovery within the boundary of the Lotta patented mining claim above described, and that said location is void and without effect."* (P. R. p. 90.)

The only way that this further answer, which commences at page 28 and extends to page 45 inclusive of the record, could affect the present status of the case before this court is by reason of two findings that are made by the court, which are numbered 8 and 9 and found at pages 89 and 90 of the record, which said findings are made to in some extent conform to the allegations of this further answer pertaining to the miners' rules and regulations and customs pertaining to the location, diversion, conveying

and application of water to beneficial use, and it is for this reason we especially urge our motion to strike and demurrer, but will further on discuss these two particular findings made by the trial court.

Carter's Alaska code, page 157, Section 63, reads as follows:

> *"The answer of the defendant shall contain —First: A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. Second: A statement of any new matter constituting a defense or counterclaim in ordinary and concise language without repetition."*

The defendant in error in its answer, until it reaches this further answer to the second cause of action in the complaint, which is moved against, bases its rights of building the dam, diverting the water and constructing the flume absolutely upon its ownership of the property upon which it is doing work, claiming it is upon the ground of the two Oregon locations and the Canyon location, and hence seeks to establish its ownership in such water, but in this further defense moved against it seeks to claim the water by reason of the miners' rules and regulations set up therein, and the local customs which it claims prevail among miners of Southeastern Alaska, all of which pertains to the right of the defendant in error to build its dam and construct its flume

irrespective as to whether it is or is not the owner of the ground upon which the location is made or that which the flume line crosses; and, in this respect, we claim that the answer is inconsistent and sets up what we claim to be inconsistent defenses, and hence, on this ground, the motion should have been allowed.

As has been stated before, all these matters are set up in the answer—not by way of cross-complaint or affirmative defenses—but merely under a denial of plaintiff in error's title; and in this connection, in one distinct statement in the answer the defendant in error alleges ownership of the lode mining claims, and by reason thereof, a right to cross the same with a flume line; and, in the same breath, claims a right to cross over the Parish No. 2 lode mining claim under the miners' rules and customs; in other words, if it is not the owner of the property, then it has the right to cross the same under what it claims to be established rules and customs of the miners of Harris Mining District, Alaska; that is, it has an easement over the same, which, of course, is inconsistent to its claim of ownership.

> *"The owner of land cannot have an easement in his own estate in fee * * * as all subordinate derivative rights are necessarily merged and lost in the higher right..* (14 Cyc., 1188.)
>
> *"The owner of an easement cannot be the owner of the estate in which it exists. The right to the fee and the right to the easement,*

in the same estate, are rights independent of each other, though existing in the same estate. Each party may protect himself by appropriate actions, one to maintain his possession of the fee, and the other to protect himself in the enjoyment of his easement." (Newell on Ejectment, p. 31.)

That is to state, if both the aforesaid contentions of defendant in error, viz: (1) that it owned the mining claims from which the water was diverted and over which the flume line crossed; and (2), that under the rules and regulations of miners it had a right of way and easement for a flume line or ditch line across the mining property belonging to others, were set up as distinct defenses, we claim that they would be absolutely inconsistent with each other for if the defendant in error owned the title then the easement could not exist as it would be merged in such title. The motion to strike should have been allowed.

We submit the same argument on our demurrer to the defendant's further answer to the second cause of action stated in the amended complaint.

II.

The court erred in allowing the defendant in error after the close of the evidence to amend its answer by pleading a non-compliance in the performance of the annual assessment work upon Parish No. 2 mining claim and pleading a forfeiture.

As we have asserted in our statement, the trial court, *after all the evidence on the part of plaintiff in error and defendant in error had been submitted*, upon motion of the defendant in error, made and entered an order permitting the defendant in error to amend its answer by inserting a clause therein, setting up another defense to the second cause of action set forth in the amended complaint by stating substantially that if the plaintiff in error ever had any title in or to the Parish No. 2 lode claim, etc., that the plaintiff in error and its grantors had failed to do the necessary annual assessment work and labor, as is required by the statutes, and any such claim which the plaintiff in error may have ever had to such Parish No. 2 claim had been forfeited. (P. R. p. 81.)

The foregoing amendment is in effect a new and distinct cause of defense. What right or authority or discretion the trial judge had, *after all the evidence had been submitted*, to permit the defendant in error, over our objection, to amend its answer by adding to the general denial therein a paragraph pleading forfeiture, we are at a loss to conceive. Carter's Alaska Code, Section 92, page 163, provides as follows:

> *"The Court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party, or other allegation material to the cause, and in like manner and for like reasons,*

it may, at any time before the cause is submitted, allow such pleading or proceeding to be amended, by striking out the name of any party or by correcting a mistake in the name of a party, or a mistake in any other respect, or when the amendment does not substantially change the cause of action or defense by conforming the pleading or proceedure to the facts proved."

We submit that the amendment so made substantially changed the other defenses which had theretofore been set up by the defendant in error, and added a new defense, *and it was error for the court to permit said amendment under the above section of the code.*

We further submit that even if the defendant in error had at the time of filing its answer included the paragraph in question, which the court after the trial of the case permitted the defendant in error to insert in its answer, that it could not have been considered for the reason that it would not have been specially pleaded. Under the section of the Alaska Code hereinbefore quoted, forfeiture would constitute a defense and should be set up separately. (Supra Alaska Code, Sec. 63, page 157.)

> *"An alleged forfeiture on the part of plaintiff must be specially pleaded by the defendant."*. (27 Cyc., 635; citing McDonald vs. Montana Wood Co.; 35 Pac., 658.)

In the case of McDonald vs. Montana Wood Co.,

supra, which was an action for trespass, the court stated in its opinion:

> *"But in this case a forfeiture was not pleaded by appellant in its answer, although the court below permitted evidence of the amount of work done on said claim for the year* 1891. *There is no evidence of a re-entry or relocation by any one on account of failure to do the required work by plaintiffs on said ground; nor does the defendant connect itself with any outstanding title adverse to plaintiff's, or plead any license or warrant to enter upon the ground in controversy.. We do not find anything in the record to support the plea of forfeiture."*
>
> *"A party relying upon a forfeiture by his adversary in these contests (to determine right to patent mining claim) for the possessory rights to mining claims must plead such forfeiture, must set forth the facts constituting the same, and prove them on the trial. The answer in the case denies the plaintiff's ownership, possession, and right of possession in the premises. It does not specially plead the forfeiture now claimed; it does not set forth the facts constituting the same; It does not inform the plaintiff that a forfeiture is to be urged, or the nature of the acts or omissions working such forfeiture. If defendant intended to rely upon a forfeiture by plaintiff, he has not observed the rules of laws governing that plea. He was properly not heard upon that plea in the court below, and*

cannot be heard now." (Wullf. vs. Manual, 23, Pac., 723.)

"*Party alleging forfeiture must prove it strictly; forfeitures are odious; the presumptions are all against it, and being a special incident not necessarily associated with the party's title, it should be alleged in the complaint or answer, that is, should be specially pleaded.* (Mor. Min. Rights, 563; Mattingly vs. Lewisohn, 35 Pac., 111.)

"*In an action of ejectment to recover the possession of mining ground, if the defendant relies upon a forfeiture by plaintiff for failure to comply with the local rules and regulations of the mining district, the forfeiture must be specially pleaded. The reason given for this rule is that 'a defense based merely upon forfeiture does not involve a denial of the plaintiff's possession, or right of possession, at the date of the defendant's entry.*" (Steel, et. al. vs. Gold L. & S. Min. Co.; 1 Pac., 448; see also: Morenhaut vs. Wilson; 52 Cal., 268.)

"*Defendant relying upon an equitable defense to an action of ejectment must set up in his answer the facts constituting the same or it will not be considered.*" (27 Cyc., 645.)

In the case of Sherlock vs. Leighton, 63 Pac., 580, Potter, C. J., on page 581, says:

"*It is undoubtedly well settled that the party relying upon a forfeiture must allege and*

prove it, and the burden of proof in the first instance rests upon him to establish the forfeiture." (Copper Mt. M. & S. Co. vs. Butte & Corbin Con. Co., C. & S. M. Co., 104 Pac. 540.; See also Renshaw vs. Switzer, 13, Pac. 127.)

We conclude from the foregoing authorities that even if the defendant in error had in the first instance set up in its answer the clause which the court permitted it to insert after the evidence was in, that it would not have been sufficient pleading of forfeiture: (1) for the reason that it would have to be set up as a separate cause of defense, and (2) that the same is not sufficient in pleading the time and manner in which the forfeiture was brought about or caused; and further, the defense of forfeiture, if properly pleaded, is a distinct, new and separate defense and the trial court had no right to permit such amendment after the completion of the trial of the case, whether such amendment was made in the nature of a separate pleading or as any part of the defendant in error's answer.

III.

For the purpose of argument, we will proceed to present to this court our views of the various assignments of error contained under specification of error V. under one head; that is, the court erred in not making findings of fact and conclusions of law offered and tendered by the plaintiff in error, which are substantially to the effect:

*That the plaintiff in error was at the time of the commencement of the action, and for several years prior thereto, seized and possessed and entitled to the possession and the owner by discovery, location, staking and marking of the boundaries * * * * * and doing and performing of the annual assessment work each and every year, of the Parish No. 2 lode mining claim; and while so possessed was ejected therefrom by the defendant in error, and the further refusal of the trial court to make the findings offered and tendered by the plaintiff that the annual assessment work and labor, as required by law, had been done and performed on the Parish No. 2 lode mining claim* (1) *for the years* 1907, 1908, 1909 *and* 1910, (2) *for the years* 1908, 1909 *and* 1910, *and* (3) *that the annual assessment work and labor had been done and performed on said lode mining claim each and every year since its location in the year* 1899*; and further, that the court erred in refusing to make conclusions of law to conform with the findings of fact, which are referred to as conclusions of law Nos.* 1 *and* 2, *offered by plaintiff, and that plaintiff was entitled to a writ of ejectment to eject defendant from Parish No.* 2 *mining claim.*

And the assignment of error contained in specification of error VII., in which it is claimed that the trial court erred in making the following findings:

(1) *That the plaintiff is not and never*

has been seized, possessed or entitled to the possession of Parish No. 2 lode claim, and that said location was made for convenience and that no discovery of mineral-bearing rock in place of any value was ever made by the plaintiff in error or its grantors, nor any indication or evidence of such as could or would warrant or justify one in spending time, work or money in the development or in the expectation of finding ore;

(2) The further finding of the court, which is in substance *that the plaintiff in error did not, prior to the year* 1909, *perform the necessary assessement work on Parish No. 2 lode claim; and*

(3) The further finding by the court, which is stubstantially to the effect *that the defendant in error proceeded to erect a part of a dam on the public domain and that at said time the property described in Parish No. 2 lode mining claim was a part of the unoccupied and unsegregated public domain of the United States.*

For the sake of brevity and on account of a better presentation of the case to this honorable court, the foregoing assignments of error will be discussed and presented under the two following subheads:

(a)—We contend that it was shown upon the trial of this case by a great preponderance of the evidence, if not by the undisputed proof, that the

plaintiff in error or its grantors had prior to any intervening rights, made a good and sufficient discovery, location, staking and marking of the boundaries and posting and recording of the location notice of the Parish No. 2 lode claim; and

(b)—That since the discovery, location, staking and properly marking of the boundaries and the posting and recording of the location notice by the plaintiff in error or its grantors of the Parish No. 2 lode claim, that said plaintiff in error or its grantors have fully complied with the laws of Alaska and the United States in the doing and performing of the annual assessment work on said mining claim.

Under this sub-division "(a)" pertaining to location and marking of the boundaries, etc., we first desire to call the court's attention to the fact that it is conceded in the pleadings that both parties to this action are claiming the ground embraced in the Parish No. 2 lode claim, as mineral ground; the defendant in error alleges that its two locations of the Oregon lode claim, as well as the location of the Canyon claim conflicts with the ground contained within the exterior boundary lines of the Lotta patented claim, as well as the Parish No. 2; and further claims that it made a good and sufficient discovery of mineral-bearing rock in place on both of its Oregon claims and its Canyon claim before location thereof. Also on page 21 of the record, the defendant in error states *"that it is engaged in the business of opening up, developing and operating mines situated at or near Silver Bow Basin, Alaska, and that*

it is the owner and in possession of a large group of mining claims composed of 31 *patented and a considerable number of unpatented claims in and near Silver Bow Basin, along Gold Creek,*" and has been engaged in the mining of part of the same.

The undisputed evidence shows that all of the claims so owned and possessed by the defendant in error lie within a mineralized zone known to all miners of Alaska and to the United States Geological Survey as the "*Juneau Gold Belt*"; and that all of the mining claims so claimed and owned by the defendant in error are contiguous and adjacent and a part of them are contiguous and adjacent to the Parish No. 2 lode claim, and in this connection we call the court's attention to the map or plat offered in evidence in this case, apparently by both plaintiff and defendant, which is so marked and found at page 1858 of the record, also "*defendant's exhibit for identification No.* 50," found at page 1718 of the record, as well as "*defendant's exhibit No.* 7, *for identification,*" found at page 1722 of the record. The latter exhibit of the defendant shows a great many objects and a great deal of data that will be hereafter referred to in this argument, and shows also the pretended Oregon and Canyon claims, as well as the Lotta and Parish No. 2 lode mining claims and the manner in which these claims conflict, and with respect to this matter of conflict, we consider said exhibit practically correct. In regard to these other exhibits, we would like to at present call this honorable court's attention to the other mining claims be-

longing to the plaintiff in error which surround the Parish No. 2 claim, a large portion of which go to make up what we have referred to in our pleadings and statement as "*the Ebner group of claims,*" and we call the court's attention to plaintiff's exhibit "N," being a map and plat offered in evidence and found at page 1850 of the record, which shows the 15-stamp mill belonging to the Ebner Company, boarding house, dump and air compressor, and many other objects of interest to which the court's attention will be called later. This 15-stamp mill is the one that is referred to in plaintiff in error's reply as having formerly been a 10-stamp mill and afterwards increased to 15-stamps. This mill has been run for years and used in mining and milling the ore taken from the surrounding mines belonging to the plaintiff in error. (P. R., pp. 153 to 159 inclusive.)

Southwesterly of the Parish No. 2 lode claim are several other claims belonging to the plaintiff in error and the defendant in error, and northwesterly is found the Humboldt lode claim, the Etta and Forrest lodes and other claims going to make up what is known as the Dora group of mining claims. Nearly all of these claims last mentioned have been patented and thereby passed upon by the Deputy United States Surveyors, as well as the Surveyor-General of Alaska, as being mineral claims, and carrying rock in place and valuable deposits of gold, and a portion of the claims belonging to both the defendant and plaintiff in error have been mined and milled for years at a profit.

We mention the foregoing facts for two reasons, to-wit:

(1) That when the mineral character of a mining claim is in dispute, it is always competent to show that the surrounding and adjacent property is mineral in nature and to what extent, and this is sometimes the very best evidence of the mineral character of the property in dispute.

> "*Evidence that land in the vicinity is mineral is admissible as proof of the character of the land in controversy.*" Mor. Mining Rights, 14 Ed., 237, citing U. S. vs. Rossi, et al, 133 Fed. 380.

In the above case, certified copies of mining locations on another of the creeks specified in the complaint locations and assay certificate of rock taken from land a mile and a half distant from the ground, the character of which was under consideration, was admitted in evidence in order to arrive at the question as to whether or not the said land was mineral or non-mineral in character.

Mr. Arthur C. Spencer, of the U. S. Geological Survey made his report in 1906, in Bulletin No. 287, at page 66, that the group of claims known a sthe "Ebner Group" are within what is known as the "Juneau Gold Belt." This is further corroborated by Mr. Alfred H. Brooks' report. Bulletin No. 259, made in 1904, at page 52, and his report made in Bulletin No. 284, issued in 1905, at page 37—all of these are public documents, which we refer the Court to

and ask the court to take judicial notice of the same.

(2) That in so much as both of the parties to this action are claiming the ground in dispute as being mineral, that the least amount of proof of a DISCOVERY is sufficient.

> *"In determing what constitutes such a discovery as will satisfy the law and form the basis of a valid mining location, we find, as in the case of the difinition of the terms "lode" or "vein," that the tendency of the Courts is toward marked liberality of construction where a question arises between two miners who have located claims upon the same lode, or within the same surface boundaries * * *."* Lindley on Mines, Vol. 2, p. 605, citing Bonner vs. Meikle, 82 Fed., 697.

Judge Hawley, speaking for the Court (the Ninth Circuit) in the case reported in the 82 Federal above referred to, states:

> *"It was never intended that the Courts should weigh scales to determine the value of the mineral as between a prior and subsequent locator of a mining claim on the same lode."*

In a case which was appealed from the Commissioner of the General Land Office to the Secretary of the Interior, found at page 440 of Vol. XXI., Land Decisions, the Secretary, near the bottom of page 441, states among other things:

> *"The mineral character of the land in question is not here involved. That is conceded in*

*that both parties are seeking to acquire title to it, under the mineral laws. * * * The claimant was not required to show 'that said claim contains a valuable deposit of mineral.' It was no part of her defense. Nor was a contrary showing a part of the protestant's case.. Hence. the first reason given in the decision appealed from why said entry should be cancelled, viz: 'that said claim is not shown to contain a valuable deposit of mineral' is entirely outside of the issue, and is unwarranted by the evidence in the case."*

We do not like to make our brief unnecessarily long but as the trial court found against the plaintiff in error on the question of discovery on the Parish No. 2 claim, and made no particular finding at all on the marking of the boundaries, posting of notices, etc., we are compelled to feel that it is absolutely necessary for us to go into the evidence and testimony given on these points in addition to the other proofs above referred to, which tend to prove the mineral character of the claim in controversy. It is almost impossible from the record to get at the testimony and evidence on these points by way of a synopsis and for that reason we will have to give the questions that were propounded and the answers given by the respective witnesses in this respect.

Mr. Ebner, the original locator of Parish No. 2 lode claim, and a witness on behalf of plaintiff in error testifies as follows:

Q.— * * * * * What did you do with regard*

to staking out and marking the boundaries upon the ground of this lode claim which is described in this notice?

A.—Why, when I got ready to stake I took several men from the crew I had working in the Ebner mine and went out and brushed out from the Lotta stake in a southerly direction. (P. R. p. 163.)

Describes from plaintiff's Exhibit "B" the line brushed out. (P. R. p. 165.) That they set alder stakes on the Parish No. 2 claim; that the side line of the Parish No. 2 claim was merely a common side line of the Lotta claim. (P. R. pp. 165-166)

That they aimed to keep the Lotta and Parish No. 2 side lines identical. (P. R. p. 166.)

Q.— * * * * I will ask you to take this exhibit here, plaintiff's Exhibit "D," and ask you if any of these corner posts and stakes that you set for the Parish No. 2 were on any of the lines of the Lotta claim as indicated on this exhibit?*

A.—Yes, sir; the northeast corner of the Parish No. 2 was set as near as we could get it on the side line of the Lotta claim. (P. R. pp. 175-177.)

Q.—About how far from any of the corners of the Lotta claim?

A.—About 125 *or* 150 *feet from the northwest corner of Post No.* 6, *as given on this plat.* (P. R. p. 177.)

Witness testifies that they brushed out in a northwesterly direction; then crossed the creek and measured off with a tape line 600 feet, etc., and when they got 1,500 feet from the post, 125 feet south of Post No. 5 of the Lotta claim, they set a stake there which was the northeast corner stake of the Parish No. 2 claim. (P. R. pp. 177-178.)

Q.—As I understand it, you followed along the lower line of the Lotta claim right in a straight line, far enough to make the upper side line of the Parish No. 2 claim fifteen hundred feet?

A.—Yes, sir. (P. R. p. 178.)

Q.—And put a post at that corner?

A.—Yes, sir. (P. R. p. 178.)

That they turned at right angles and ran 600 feet. (P. R. p. 179.)

Q.—And what did you do there, if anything?

A.—Then, we turned at right angles and ran 1,500 *feet, and then turned at right angles and ran* 660 (600) *feet, and then came along here to see how near perfect this was because this turned, and it checked out. We measured all the way along up here until we got to the posts here — we measured clean around the claim, all around the claim.* (P. R. p. 179.)

Q.—Did you make any corner posts at these different corners?

Q.—Then, as I understand it, you staked out a claim there that was 1,500 *feet long, in-*

tended to be, as near as you could measure it?

A.—Yes, sir, at every corner we put a post.

A.—Yes, sir. (P. R. p. 179.)

Q.—And 600 *feet wide?*

A.—Yes, sir. (P. R. p. 179.)

Q.—What, if anything, in the way of precious metals did you discover upon the area which you have just described within the side lines and end lines of the Parish No. 2 *claim?*

A.—I discovered quartz in place carrying gold values, very near, within a few feet of where the location stake was set. (P. R. p. 180.)

Q.—Where did you set the location stakes?

A.—That stake, the location on the south, as I said, we went up 125 *feet and then turned at right angles, went across and at* 300 *feet we set the corner post, this location stake came within a very short distance of the place where I had discovered quartz in place carrying gold, on the north side of what is called the Borean pit, the old placer pit mined years ago, and I discovered there rock in place carrying values where this crossed the creek.* (P. R. p. 180.)

Q.—Where the old line—

A.—Where the old line crossed the creek, about four or five hundred feet from that, not exactly in the center of the claim but along in there I found where it carried values. (P. R. p. 180.)

Q.—This was all, as I understand it, within the exterior boundary lines of the Parish No. 2*?*

A.—Yes. sir. (P. R. p. 180.)

Q.—And near the center of the claim?

A.—Very near the center of the claim—we discovered it very near the center, within a few feet, probably. (P. R. p. 180.)

Witness testifies that after making discovery he had assays made and that the values ran from $1.50 to $2.10; that the general value of ores on mining property all up and down the creek were from $1.50 to $3.50, and such values compare very favorably with the value of the ore that witness has mined and milled. (P. R. p. 181.)

Witness testifies that in 1908 he had survey made, etc. (P. R. p. 195.)

Q.—Now, Mr. Ebner, that brushing out you did on what you are testifying about as being the lower side line of the Lotta, the brushing out you did in 1908,*—how did that compare with what you did in* 1899 *with respect to being over the same ground?*

A.—It was over the same ground,—the brush had grown up again but we could see the old stumps where it had been cut down. (P. R. p. 196.)

Q.—What about the stakes of the Parish No. 2. * * * * * *Have you done anything with respect to keeping that corner intact, or keeping it up since the Parish No.* 2 *was located?*

A.—No, I think the original stake is there. (P. R. p. 200.)

Q.—And what about the other corner stake you referred to, which was in a direct line or the projection of the lower side line of the Lotta?

A.—That stake in 1908 *was replaced by a larger stake.*

Q.—What did you find when you made that survey in 1908*?*

A.—I found it was getting old and it was rotting, so we made a larger stake there to put in place of it. (P. R.p. 200.)

Witness testified that the lode line stake of said Parish No. 2 was not in place but they found where the monument had been. "We found where the rock had been piled around it," and witness knew where it belonged and where it was originally driven, etc. (P. R. p. 201.)

This witness being recalled later during the trial, upon cross examination testified with reference to discovery on the Parish No. 2 substantially as follows:

Q.—So you went out there some time—was it August, 1899?

A.—It was during the latter part of the summer. I prospected around for some time before we started to locate them.

Q.—And your location notice described your discovery point?

A.—Yes, sir; within a few feet or a short distance; yes, sir.

Q.—I wish you would describe to the Court the appearance of that discovery.

A.—Why the discovery on the Parish No. 2, Mr. Shackleford, is just north of a pit, an old pit that was there.

Q.—The Borean pit?

A.—The Borean pit and the bedrock stuck out in one place there and showed quartz—that was the discovery for the Parish No. 2.

Q.—Is that bedrock there now?

A.—I think that that bedrock is blasted out. I think that is where the open cut was made.

Q.—It is blasted out?

A.—Yes, sir. (All above P. R. p. 715.)

Q.—After you got through sampling and blasting this rock did you leave any there that anybody could find any value in?

A.—I didn't carry any rock away except that which I used for assaying. (P. R. p. 716.)

Q.—Did you leave any rock of value there?

A.—Yes, sir. (P. R. p. 716.)

Q.—Could you show it to anybody now?

A.—Yes, sir. (P. R. p. 716.)

Q.—Where else?

A.—There is a point down the creek from the tunnel I started a little ways, and up on the bank there are some stringers that show there, and that is where we made the open cut, and there is quartz piled to one side now, some little of it left that the slide has not taken down and

some boards lying there. We had a large open cut there, some twenty-odd feet long and seven or eight feet wide, in order to get down to the solid rock, and there is some good pay-rock there. (P. R. p. 717.)

Q.—Not in place? *A.—Yes, sir.*

Q.—Can you show that?

A.—Yes, sir. (P. R. p. 717.)

Q.—And it will assay pay-rock?

A.—Yes, sir, take an average sample across there and it will assay. (P. R. p. 717.)

Q.—What is the width of that cut, the average sample?

A.—That cut was right across the formation, and, if I remember right now, there was some sixteen or eighteen feet there. (P. R. p. 717.)

Q.—Where is that cut? Make it on this map.

A.—I can do it approximately. Is the lower end of tunnel marked on here? (P. R. p. 717.)

Q.—Yes, it is right here—the upper is here and the lower one there. You are referring to the tunnel underneath the present Alaska-Juneau flume-line?

A.—It is the one close down by the creek; when the water is high, high water almost runs into it—it does run into it when it is high, very close to it, and it is just above that tunnel, down the creek, on the bank. I can mark that approximately. (P. R. p. 717.)

Q.—How far from that tunnel down the creek?

A.—It is probably 30 *feet or so down the creek and up on the bank. The bank is very high. I mark this here—it will be very approximate, because the bank slopes some there.* (P. R. p. 717.)

Q.—It is that open cut?

A.—It is in that open cut; yes sir. (P. R. p. 717.)

Q.—And the open cut is plainly visible?

A.—Yes, it is visible from the road now—I have marked it there with a lead pencil mark. (P. R. p. 717.)

Q.—How is it marked?

A.—I have made two straight marks. (P. R. p. 718.)

Q.—That is the two lead pencil marks just down the creek from the place marked tunnel?

A.—Yes, sir. (P. R. p. 718.)

Q.—Did you follow that up, that ledge up?

A.—No, we prospected that on the surface, done the work there and then started a tunnel below. (P. R. p. 718.)

Q.—In 1904 *you quit doing all your underground work?*

A.—I don't remember whether it was in 1904. (P. R. p. 718.)

Q.—It has been some years since you have done any underground work?

A.—Yes, sir. (P. R. p. 718.)

Q.—And you commenced working another part of the claim?

A.—Yes, we worked on another part. (P. R. p. 718.)

Q.—You know as a matter of fact, don't you, that that claim is out of the known value belt of the country through there?

A.—I don't know anything of the kind. I know there is value there. (P. R. p. 718.)

Q.—You want the Court to understand that the Parish lode was not located for any purpose of convenience in saving your rights?

A.—No, sir. (P. R. p. 718.)

Q.—To reach the other side of Cape Horn?

A.—No, sir. (P. R. p. 718.)

Q.—You had no such idea in mind at the time?

A.—No, sir; not at all. (P. R. p. 718.)

Q.—Do you know any other place—can you point me to any other place on the Parish lode where pay and rock in place can be found?

A.—Approximately, yes. (P. R. p. 719.)

Q.—Approximately?

A.—Yes, sir (P. R. p. 719.)

Q.—Where is it?

A.—Close to the Lotta line, and almost opposite the cabin, about thirty or forty feet from the Lotta line, in one of those cuts I made across there I found some good pay-rock. (P. R. p. 719.)

Q.—Is that on the Lotta or Parish?

A.—Parish. (P. R. p. 719.)

Q.—Up on the bank or down the creek?

A.—It is on the incline—it is all inclined there. (P. R. p. 719.)

Q.—I wish if you know any other place on the claim where there is pay-rock in place you would indicate it?

A.—On the Parish No. 2. (P. R. p. 719.)

Q.—On the Parish No. 2

A.—Well, right close to where I marked there, there is two crosscut ditches that I made —they are close together there, and there is pay on the same trend that that is marked, in both ditches. It shows there is a belt through there that carries pay. (P. R. p. 719.)

Q.—That is across the formation?

A.—That is across the formation; the formation trends northwest and southeast and these cross—my aim was to make these cuts cross the formation; it is about in this direction. (P. R. pp. 719,720.)

Q.—What year was it you discovered mineral in these other places—take, for instance, the place down underneath the present Alaska-Juneau flume, marked with two marks and near the tunnel?

A.—You mean right where the tunnel is? (P. R. p. 721.)

Q.—The place you call open cut, down near the creek from the tunnel?

A.—Oh, I think we started there along about 1901. (P. R. p. 721.)

Q.—When did you get through work there?

A.—We worked there several years in that open cut. (P. R. p. 721.)

Q.—And when did you discover the mineral? And where?

A.—We discovered the mineral on the edge as we started in—there was some showing of quartz on the edge at the break. (P. R. pp 721.)

Q.—Did you have it assayed?

A.—Yes, sir.

Q.—Have you got any record of that assay?

A.—I expect there is a record somewhere, but I wouldn't know where to look for it. (P. R. p. 722.)

Q.—Now, on the place marked over here near the house on the Lotta lode claim—when did you make that discovery?

A.—I made that discovery along in 1902 *or* 1903—*somewhere along there.* (P. R. p. 722.)

Q.—There is another place you mention besides that and besides the discovery point?

A.—Near the Borean pit? (P. R. p. 722.)

Q.—The one near the Borean pit is your discovery, is it not?

A.—That is the discovery. (P. R. p. 722.)

Q.—There is one a little ways down the creek from the tunnel there, I think you said below the open cut, another place down there?

A.—No. (P. R. p. 722)

Q.—That ground up there near the shack that is on the Lotta lode claim, is that solid formation?

A.—I got down to the solid formation, yes, sir. (P. R. p. 722.)

Q.—How deep did you have to go?

A.—Some places four or five feet—six feet in some places. (P. R. pp 722.)

Q.—The summer of what year?

A.—We worked there in the summer of 1899. *We started to do some of that work in* 1900 *and* 1901. (P. R. p. 723.)

Q.—Was the discovery made in 1899 *or* 1900*?*

A.—That discovery just below the cabin? That was not made until 1902 *or* 1903. (P. R. p. 723.)

Q.—And the discovery in the open cut near the creek?

A.—That was made, I think, in 1901, *that discovery there.* (P. R. p. 723.)

Q.—What time of the year was that?

A.—I don't remember just the time—it was the summer season. (P. R. p. 723.)

Q.—And the open cut here?

A.—You mean the Borean cut? (P. R. p. 723.)

Q.—Yes.

A.—That is our discovery and that is where we started work in the first instance—got the water in and got the dam in. (P. R. p. 723.)

Q.—How far is your discovery in the Parish No. 2 lode—your original discovery of 1899—*how far is it from there to the end line stakes* 3 *and* 4 *of the Parish No.* 2 *lode as indicated on this map?*

A.—You mean the discovery of No. 2*?* (P. R. p. 723-724.)

Q.—Yes.

A.—It is only a short distance. The discovery stake was not set right on the discovery—just a little south of it. (P. R. p. 724.)

Q.—Your location notice was posted in a tin can on your discovery stake?

A.—Yes, sir (P. R. p. 724.)

Q.—And it was just a few feet from the north end line of the Parish—I mean from the southeast end line of the Parish No. 2*?*

A.—From the southeast end line of Parish No. 2, *yes, sir.* (P. R. p. 724.)

Mr. Ebner testified concerning the discovery or discoveries having been made upon the Parish No. 2 lode claim prior to the year 1909 substantially as follows:

That in the year 1903 he continued the cross-cut ditches and the open cut and thoroughly prospected the ground where these ditches had been made the year before.

Mr. Shackleford, one of the attorneys for the defendant in error, objected to this testimony and it was stricken out by the Court and

the Court stated to the witness that he could state in a detailed way what work he did and what the work consisted of. Then the Witness Ebner proceeded to state that he stripped down to bed-rock, and took assays to ascertain where the values were, if any existed, across the claim; that he found that there were values and then that he, that same year, built a blacksmith shop and started the approach, or, what you might say, squared up for a tunnel. (P. R. pp. 211-212.)

LLOYD G. HILL, a witness on behalf of the plaintiff in error, was called as a witness, and at pages 250 and 251 of the record, testified substantially as follows, and referred to plaintiff's exhibit "N," to-wit:

That he went on the property in controversy in 1898 and at that time assisted in running the southwest side line of the Lotta lode claim, or the line 5-6 between stakes numbered 5 and 6, and at that time also practically ran over the north end lines of the entire Ebner group and also some of the southeast end lines, that would be the northwest end lines. He was over that claim when he made an official survey of the Idaho and Colorado claims (belonging to defendant in error) in the year 1904. The first time he saw any of the Parish stakes was in 1899. There were some small stakes there and he did not know what they were, and when making the

Colorado survey in 1904 he saw the common end line between the Parish No. 1 and 2. This common end line would be the southeast end line of Parish No. 2 and the northeast end line of Parish No. 1. It is line 3-4 of the Parish.

Also was on the Parish No. 2 in 1908 and assisted Mr. Wettrick in making an official survey of it; and saw stakes of said claim on the ground.

F. J. WETTRICK, U. S. Deputy Surveyor, witness on behalf of the plaintiff, testifies: That he surveyed the Parish No. 2 claim in 1908; that he made such survey for the purpose of locating the corners of the Parish No. 1 and No. 2. (P. R. p. 279.)

That he ran a line in a southeasterly direction on the westerly side line of the Lotta, etc., and found a post 5x5 two feet above the ground, that from that point he ran 600 feet in a southwesterly direction parallel to the end line of the Lotta claim, and found a post at the other end of that end line; that he then ran across the southwesterly end line, turned at right angles and continued up the line of the Parish claim and also ran in a southeasterly direction on the side lines of the Royal claim some distance and over the old slashing and rebrushed the line. (P. R. pp. 280-281.)

Witness also made further surveys of the Parish No. 2 in 1910, and found corner No. 5 on the side line common of the Parish No. 2 lode,

and Lotta lode, also monument 3 of the Parish No. 2 lode, also monument of the intersection of Forrest lode with the side line of the Parish and Lotta; also monument No. 2 of the Parish No. 2 lode, which is common to monument No. 1 of the Parish No. 1 lode. (P. R. p. 283.)

R. A. KINZIE, agent and superintendent of the defendant in error, testified on behalf of the said defendant in error pertaining to the mineral character of the Parish No. 2 lode claim, and the fact of there being a lead, lode or vein thereon and rock in place carrying gold, among other things, as follows, to-wit:

Q.—What, if anything, did you find upon the Oregon lode claim when you were first upon the ground in the way of quartz or other rock bearing values, in place?

A.—Why, it was the first time I had been on the ground and going up the Basin we covered the ground as included in the Colorado, Wyoming, Oregon and Idaho claims. The work that we were doing at the time was just over the line from the Oregon and on the Colorado. At the time we took some samples— I have forgotten exactly at what point and then made a general connaissance up the creek as far as we could go on the ground included in the Oregon claim and also up the hill on the Wyoming and the Oregon and on the lower part of the Colorado. We went over the ground and determined as far as we

could by looking at it the general line, the mineral zone passing through there and know we were trying at that time to determine the footwall of the main ore body.

Q.—What did you find in the way of rock in place, bearing gold or other precious metals at that time?

A.—Why, we found mineralzied schist and quartz in place. We made no assays at that time, but we thought it was mineral bearing, gold-bearing. (P. R. p. 761.)

Q.—Where was that rock in place found by you at that time on the Oregon, with reference to the location of the Parish claim, as indicated on this plat, exhibit 7?

A.—To the best of my recollection it was both on the south side and around the point. We went around the point, just above where the cabin, the Alaska-Juneau cabin, is now located —both on the north and south side of that point and around the point.

Q.—Please mark with a letter "a" on this plat the point as near as you can recall where you discovered that rock in place, of which you were speaking, bearing gold?

A.—Why, it was about a point in here—

Q.—Mark it with the letter "a."

(Witness does so.)

Q.—What kind of mineral did that rock carry in your judgment?

A.—Why, the country there is a broken up

shist containing iron pyrite and small quartz stringers—it is a pyrite principally. (P. R. p. 762.)

Q.—What does it carry—gold?

A.—Why, it does carry gold; sometimes less sometimes more.

Q.—When were you next upon the ground within the Oregon location as indicated here on the map and made any discovery of rock in place, bearing gold or other precious metals?

A.—Why, I was on the ground embraced in these four or five claims there a number of times each year afterwards. I wouldn't go to look for any particular discovery, assumed we had a discovery there in plain sight.

Q.—Where was the ore in plain sight on the Oregon lode.? I am not speaking now of the Colorado; I am speaking of the Oregon.

A.—Where Gold Creek and Snowslide Gulch had cut through—giving a cross-section of the country rock.

Q.—Where is that with reference to the point marked "a" by you?

A.—It is right in that general vicinity, both sides—you get a very good cross-section there on the north and south side of that point.

Q.—That is the same ore you saw in place there in 1900 *or* 1901 *whenever it was, when you were there the first time? A.—It was, yes.*

Q.—Now, Mr. Kinzie, do you know the ground covered within the boundaries of the

Parish No. 2 lode claim as platted upon this plat —have you been over that ground? (P. R. p. 763.)

A.—I know the south part or the south two-thirds of the claim very well.

Q.—Southerly two-thirds?

A.—Southerly two-thirds, yes; the northern part of the claim I am not so well acquainted with.

Q.—You know that if this Canyon claim, which you located, is a mining claim, with sufficient indications to convince you that there is something there to locate—if that Canyon claim has a point of discovery at the point you indicated on your map a while ago and has its side lines parallel to the Lotta lode claim and taking in part of the Parish and part of the Lotta—if that is true, you thought there was sufficient indications to make a location there?

A.—On the Canyon?

Q.—On the Canyon. A.—Yes, I thought so. (P. R. p. 827-838.)

Q.—You contend, do you, that so far as your judgment is concerned, there is no mineral-bearing rock, in place, at all between the creek and the upper end in line of the Parish lode No. 2.? A.—No.

Q.—You make no such contention as that?

A.—No.

Q.—Your Canyon claim, as you claim it is located, takes in a part of the Parish lode claim

No. 2, does it? (P. R. pp. 887-888.)

A.—I think the discovery is on the Parish—it is over the line that has been shown of the Lotta. We located it with the idea that it was above the Parish line. (P. R. p. 888.)

Q.—You not being satisfied with the old Oregon location you had a new Oregon location made over almost identically the same ground the old Oregon was made over?

A.—The second Oregon was made over almost the same ground, yes.

Q.—And not satisfied with those two locations you had another Canyon location made which covered a good portion of the ground of both the Oregon claims?

A.—No, sir, it covers entirely different ground. (P. R. p. 946.)

Q.—Do you know anything about it?

A.—I absolutely know.

Q.—When you take that location of the Canyon claim which is up the creek about 60 *feet from your dam and has a parallel line along there as the lode line of your discovery and then you take* 300 *feet on either side, don't you take a good portion of your Oregon claims?*

A.—We take a portion of them; yes. (P. R. p. 957.)

Q.—Then, you do know as a matter of fact that when you signed that answer you had nothing else in the world in there except the old Wy-

oming claim and the old location of Corbus to base your defense on in that suit?

A.—I think it was sufficient. (P. R. p. 957.)

B. D. STUART, a witness called in behalf of the defendant, testified as follows:

That he found quartz seams in place on the Oregon along the point of the hill, just above the point marked "Cabin," as indicated on Exhibit 7 above the flume; that it was such quartz as an assay for gold might be obtained from; that such point of discovery witness would say was 60 feet or more from the cabin and off the Parish No. 2 claim, as shown on Exhibit 7. P. R. pp. 970-971.)

On cross examination witness testifies that he came to Alaska last fall, the 15th of October, (1910) and that his principal work here has been surveying on Gold Creek for the defendant company in regard to the property in litigation. (P. R. p. 990.)

Q.—You said the formation or strike of the formation of the country runs approximately along those lines?

A.—I believe so; yes, sir.

Q.—Then the Oregon lode claim would not be made with respect to the formation?

A.—Not with respect to the formation—there are some quite prominent quartz seams that strike in a different direction. (P. R. p.

998.)

Q.—You don't know what discovery was relied upon in the location of the Datson Oregon claim, of your own knowledge?

A.—No.

Q.—Nor you don't know what discovery was relied upon in the Canyon claim, of your own knowledge?

A.—No. (P. R. p. 1004.)

W. R. LINDSAY, a witness called on behalf of the defendant, testified as follows:

That he was a surveyor employed by the defendant; that he has also taken a course in mining and engineering, and graduated from the University of Washington two years ago; that he made preliminary surveys of the Canyon claim and knows where the discovery is on said claims. (P. R. pp. 1036-1038.)

That he went in company with Whalen and Jones to what is known as the Borean pit, and found bed rock along the creek and then went over the hill to the pit and took samples of the rock there but could not find any indications of bed rock; that he found rock that looked the same as the boulder in the pit, etc. (P. R. p. 1039.)

On cross examination, witness testified that he never did any mining on Gold Creek or Silver Bow Basin; that he has examined rock in place in a good many different places; that the

first time he was in that section was a year ago. (P. R. p. 1041.)

That he knows the Oregon claim was located by Datson. (P. R. p. 1042.)

That he made the location of the Canyon claim and made a discovery and located it according to the strike of the country there. That there is rock in place on said Canyon claim; that there is no trouble in finding rock in place anywhere on Gold Creek from where he made discovery for 600 or 700 feet. (P. R. pp. 1046-1047.)

That the discovery on the Canyon claim is a distance of about 50 feet above the dam. (P. R. p. 1046.)

Q.—Did you go down Gold Creek this morning to see if you could find any rock in place, bed rock, down between your flume—the defendant company's flume and the creek?

A.—I seen the bedrock in place a good many times when I was there before.

Q.—The bedrock, now, that you speak of that you found at those places, do you mean it was mineralized rock?

A.—In places it assayed a little bit and in some places it did not.

Q.—Do you remember just where those places were?

A.—No, I don't remember. Up on the hill, I remember.

Q.—It shows it is mineralized?

A.—It shows it is mineralized; yes, sir.
(P. R. p. 1049.)

Proceeding with our argument under the third assignment of error and subdivision "a" thereof, we will continue along the line commenced, that is: WAS THERE A GOOD AND SUFFICIENT DISCOVERY MADE BY THE PLAINTIFF IN ERROR OR ITS GRANTORS ON THE PARISH NO. 2 CLAIM AT ANY TIME BEFORE ANY INTERVENING RIGHTS OF OTHERS?

As has already been stated, the Trial Court found that neither of the locations made of the Oregon lode claim by Corbus or Datson were good, but were void from the beginning, also that the Canyon location made by Lindsay was void and without effect from the beginning. Hence, no rights whatever were initiated under any one of these three locations, as from the findings of the Court these three locations were void ab initio. The above being true, the defendant in error has nothing to fall back upon, except what we claim was its wrongful entry upon both the Parish No. 2 and the Lotta lode claims in 1910, and the construction of a dam thereon and a flume line across the Parish No. 2; and if this entry was wrong, as we expect to show that it was, then no rights could be predicated upon it.

We have had printed in this brief considerable of Mr. Ebner's testimony showing the various discoveries that he made upon the Parish No. 2 claim prior to any one making claim to any part or portion of

said mining claim, and we will now attempt to summarize, giving the time and place that these discoveries were made. The first one made is the one that defendant in error made such a great ado about and was in or about what is referred to as the Borean pit, which is near the center of the southeasterly end line of the said Parish No. 2 claim near the point marked "open cut" on plaintiff's Exhibit "N." (P. R. p. 1850.) The witness Ebner testifies that this discovery was made when he was staking out and marking the boundaries of the mining claim in question.

Another discovery made at the same time, related in Ebner's own language, is: "Where the old line crossed the creek, about 400 or 500 feet from that, not exactly in the center of the claim but along in there I found where it carried value." (P. R. p. 180.)

Ebner further stated that after making discovery he had assays made and the values ran from $1.50 to $2.10; that the general value of ores on mining property all up and down the creek was from $1.50 to $3.50, and compared favorably with the ore that witness had mined and milled. (P. R. p. 181.)

Witness further states, in his own language, another discovery as follows: *"There is a point down the creek from the tunnel I started a little ways, and up on the bank there are some stringers that show there, and that is where we made the open cut, and there is quartz piled to one side now, some*

*little of it left that the slide has not taken down * * * * *. We had a large open cut there, some twenty-odd feet long and seven or eight feet wide, in order to get down to the solid rock, and there is some good pay-rock there.*" (P. R. pp. 716-717.)

Ebner was then shown a photograph that had been identified and afterwards introduced in evidence and marked: "Plaintiff's Exhibit "QQ," and found at page 1855 of the record, and stated that he had the picture taken and wanted to get in this quartz that was piled out and as much of the open cut as was possible, and that this photograph showed the result, and that this open cut was made in the year 1901 and that the quartz is on the bank of the creek, not over 10 feet from the bank, (meaning Gold Creek,) and that he was present when the picture was taken and that Exhibit "QQ" was taken right on the bank of the creek; that this photograph represents the open cut which he had before testified concerning. (P. R. pp. 1270-1272.)

Witness further states that he was present when the photograph marked "Plaintiff's Exhibit "PP" was taken: (Found at page 1853 of the record) that it represents the same formation, etc., as his other discovery at or near the Borean pit. (P. R. pp. 1270-1272.) The witness further states: "** * * there are two crosscut ditches that I made—they are close together there and there is poy on the same trend that that is marked, in both ditches. It shows there is a belt through there that carries pay.*" (P. R. p. 719.) Witness further states that these

two cross-cut ditches were made close to the Lotta line and almost opposite the cabin on the hill and about 30 or 40 feet from the Lotta line, and in one of them good pay-rock. (P. R. pp. 718-719.) Also see "Plaintiff's Exhibit "N" (P. R. p. 1850) with two parallel cross lines, which the witness made to indicate the cross-cuts, which are near the south-easterly corner of the Parish No. 2 claim and near the figures "13758." (P. R. p. 721.)

Witness further testifies that there was another discovery made by him in 1903 while he was doing the assessment work. In that year while doing the assessment work he stripped down to bed rock and took assays to ascertain where the values, if any, existed across the Parish No. 2 claim, and found that there were values, and that that same year he built a blacksmith shop on the Parish No. 2 claim and started the approach of a tunnel. The witness then identified "Plaintiff's Exhibit 'M' " and pointed out the tunnel. (P. R. pp. 212-213; Ex. 1854.)

There being no intervening rights of the defendant in error, all these discoveries were good as against it.

> "*If a location is made before discovery, but is followed by a discovery* * * * * * before any *adverse rights intervene, such subsequent discovery cures the original defect and the claim is valid.*" (Mor. Mining Rights, 14 Ed., 36, citing numerous authorities.
>
> "*A location is made valid by the discovery*

of a vein or lode at any time after the location, provided that such discovery is made before any rights are acquired in the same lode by other persons." Jupiter Min. Co. vs. Bodie, XI. Fed., 666. See also Nevada Sierra O. Co. vs. Home O. Co., 98 Fed., 674; Waskey et al vs. Mammer et al, 17 Fed., p. 31.)

All these discoveries made by Mr. Ebner are undenied except that one claimed to have been made at or near the Borean pit, and there was some dispute on the trial of the case as to whether or not the discovery at the Borean pit was rock in place or slide—plaintiff in error's witness testifying that it was rock in place, and some of defendant in error's witnesses testifying that it was not—but we do not think that there was any dispute over the question that the rock at that place carried values and the particular stratification that carried the values had the same dip as was found in rock further up on the hill that was conceded to be in place. We do not see how this could well be and then the rock be slide. No one ever reached the depth of this rock at Borean pit, although defendant in error, during the trial, made several attempts to do so but failed. It offered many photographs showing the formation at that place and did a great deal of excavation work around this formation, which was done in a manner calculated to make it look as much like slide rock as possible. However, there are so many other discoveries made by Mr. Ebner, which are practically undenied by the defendant in error, and are to a great ex-

tent corroborated by the witnesses of the opposing party, that we do not care to take the time to dwell any further on the question as to whether the discovery made at or near the Borean pit is or is not rock in place. We invite the Court's careful attention to the portions of the testimony of Mr. Ebner set out in this brief, as well as to other portions of it in the printed record.

R. A. KINZIE, Agent and General Superintendent of the defendant in error, was called upon to testify in behalf of his company and was asked when he first went upon the Oregon lode claim, which was located by J. P. Corbus in 1899, and when he first ascertained that there was any rock or quartz in place carrying values. He answered substantially that he had been on the ground and covered all the ground as included in the Colorado, Wyoming, Oregon and Idaho claims and at the time took samples but had forgotten at just what point they were taken; that he made a general *connaissance* (reconnaissance) up the creek as far as he could go on the ground in the Oregon claim and also up the hill on the Wyoming and the Oregon claims and on the lower part of the Colorado; and, using the plural, said: "We went over the ground and determined as far as we could by looking at it the general line, the mineral zone passing through there and know we were trying at that time to determine the footwall of the main ore body." * * * * * "* * * We found mineralized shist and quartz in place. We made no as-

says at the time, but we thought it was mineral bearing, gold-bearing." (P. R. pp. 761-762.)

We would like to here call this Honorable Court's attention to defendant's Exhibit 7, (P. R. p. 1722) which we have heretofore referred to in this brief, which shows, among other things, the Lotta lode claim, the exterior boundary lines thereof, as contended by us on the trial, and the exterior boundaries thereof, as contended by the defendant in error; also showing the Oregon lode claim, as located by Datson, also the exterior boundary lines of the Parish No. 2 claim and the Canyon claim, which was located by Lindsay. The said exhibit shows the mining claims referred to, as contended for by the respective parties to the suit, practically correct. The Court decreed the Lotta claim to the plaintiff in error, as was contended for by it. The witness Kinzie referred to this plat considerably in his testimony and in his answer to the question as to where the rock in place was found by him at the time he went over the Oregon, as above related, referred to this exhibit and answered the question as follows: "To the best of my recollection it was both on the south side and around the point. We went around the point, just above where the cabin, the Alaska-Juneau cabin, is now located—both on the north and south side of that point and around the point." (P. R. p. 762.) The cabin referred to is marked on Exhibit 7 and is on the southwest corner of the claim. This further question was then propounded to the witness Kinzie:

Q.—Please mark with a letter "a" on this plat the point as near as you can recall where you discovered that rock in place, of which you were speaking, bearing gold?

The witness marked "a" on the exhibit above the cabin close to the flume line of the defendant in error, and very near the lower side line of the Parish No. 2 lode claim. The witness further said that this discovery was made *about* at that point. Then the following question was propounded to the witness:

Q.—What kind of material did that rock carry in your judgment?

A.—Why, the country there is broken up shist containing iron pyrite and small quartz and carries gold; sometimes less, sometimes more. (P. R. pp. 762-763.)

The witness further stated that this discovery that was made was in plain sight, and when asked the question: "Where the ore was in plain sight on the Oregon lode," he answered: "Where Gold Creek and Snowslide Gulch had cut through, giving a cross-section of the country rock." The witness was then asked: "Where is that with reference to the point marked "a" by you?" and answered, "It is right in that general vicinity, both sides—you get a very good cross-section there on the north and south side of that point;" and then further stated that this is the same ore that he saw in place in 1900 or 1901; that he is acquainted with the south part or the southeast two-thirds of the Parish No. 2 claim very well,

but that he is not so well acquainted with the north part of the claim. (P. R. pp. 763-764.)

The witness further stated that he was acquainted with the Canyon lode claim and knew where the discovery point was thereon and thought that there was sufficient indications to make a location and further stated that he had not made any contention that there was not any mineral bearing rock in place between the upper end line of the Parish No. 2 claim and the creek; that he thought the discovery made on the Canyon claim was on the Parish No. 2 claim.

MR. LINDSAY, who located the Canyon claim, stated that at the time he made the location he made a survey of it and that he was in company with a man by the name of V halen; that he had been up to the place called "Borean pit" and found bed rock all along the creek and stated that he knew the Oregon lode cliam. That he made a discovery on the Canyon claim and located it according to the strike of the country; that there is rock in place on the Canyon claim and that there is no trouble in finding rock in place anywhere on Gold Creek where he made the discovery for 600 or 700 feet; that the discovery on the Canyon claim is about 60 feet above the Alaska-Juneau dam. (P. R. pp. 1038-1042.(The dam referred to is the dam of the defendant in error, relative to which the Court made a finding stating that it was partly on the common side line of the Parish No. 2 and the Lotta claims, and is indicated on Exhibit 7 by a line drawn across Gold Creek on or near

the lower side line of the Lotta, as was established by the Court's decision. (P. R. pp. 1044-1045.)

Witnes was then asked:

> *Q.—Did you go down to Gold Creek this morning to see if you could find any rock in place, bed rock, down between your flume—the defendant's flume and the creek?*
>
> *A.—I seen the bed rock in a good many places when I was there before.*

Witness further states that it was mineralized rock and in some places it assayed a little bit and in others it did not * * * that he did not remember just where those places were * * * that he saw some up on the hill that was mineralized rock. (P. R. p. 1049.)

B. D. STUART, a witness on behalf of the defendant in error, stated that he was a mining engineer and that he saw the rock in place which the witness claimed was a discovery on the Oregon lode claim, and stated that the Oregon location was not made with respect to the formation but that there were some quite prominent quartz seams that strike in different directions. (P. R. p. ——.)

It seems that in the testimony of the various witnesses that they have used the words "bed rock" inter-changeably with "rock in place bearing gold or mineralized rock." On the said Exhibit 7 of the defendant there is marked "bed rock" near the center of the Parish No. 2 claim and one on either side of the flume. They are about in the same place

that Mr. Ebner testified that he made a discovery.

We claim that the testimony of these last three witnesses just above referred to corroborate Mr. Ebner's testimony as to his discoveries which he testified concerning, and we think that we can demonstrate it in a few words and will refer to the defendant in error's Exhibit 7 in doing so.

Kinzie testified, and it was corroborated by the witness Stuart, that the discovery on the Oregon claim is in the *vicinity* of the letter "a" on the Exhibit in question; and the witness Kinzie further claims that when he first went on the Oregon claim he went its full length or as far as he could go up the creek and made a general examination of the formation and that he did so with the intention of finding out where the mineralized zone passed through there; that he found mineralized shist or quartz in place which was mineral-bearing or gold-bearing. That this was both up and down from the discovery point marked "a." The witness Lindsay testified that he saw mineralized rock (rock in place) all along up and down the creek, just below the flume line. This witness also testifies that the discovery point on the Canyon claim is only 60 feet above the dam on Gold Creek, which means just 60 feet from the upper side line of the Parish No. 2. The witnesses of the defendant in error have testified to such facts concerning discoveries made on the Canyon and Oregon claims and the nature of the surrounding country so as to absolutely prove that all up and down Gold Creek, as it crosses the Parish No. 2 claim,

there is gold-bearing rock in place. The defendant in error's witness Lindsay, who located the Canyon claim, testified that his discovery was on Gold Creek, just 60 feet above the dam, which said dam is on the upper side line of the Parish No. 2 claim; and further, to the effect that there was mineralized or gold-bearing rock up and down the creek 600 or 700 feet from said point of discovery, which means, that such rock can be seen up and down the creek the entire width of Parish No. 2 claim.

If this testimony of the witness of the defendant in error is true, then it corroborates Mr. Ebner's uncontradicted testimony wherein the latter swore to several discoveries made upon the Parish No. 2 mining claim, and hence the Court should have signed and filed the finding which we tendered which emgbraced the fact that we had made a good and sufficient discovery upon the mining claim in question, and the court erred in making the finding that it did make concerning this matter.

The last question to be considered under subdivision "a" of assignment of error III. is the question of the staking and marking of the boundaries of the Parish No. 2 lode claim by Mr. Ebner, the grantee of the plaintiff in error.

We shall not consume much time in presenting this feature of the case to the Court for the reason that by the Trial Court's finding establishing the boundary lines of the Lotta patented claim, as contended for by the plaintiff in error, and the Lotta being one of the oldest patented claims on the creek,

having been patented for 20 or 22 years, *it is itself a permanent monument.* The location notice of the Parish No. 2 ties up that claim to the Lotta lode claim, and to the Lotta lode claim as it is established by the Court; and in this connection, we call this Honorable Court's attention to the location notice of the Parish No. 2 lode claim found at pages 1659 and 1660 of the record.

We briefly present to the Court some of the undisputed evidence in the case pertaining to the subject matter under discussion.

After Mr. Ebner had been questioned about the location notice just referred to, and had identified it as a copy of the one that was posted on the ground at the time of staking, (P. R. p. 161), he proceeded to testify that when he got ready to stake the claim, he took several men from the crew that he had working in the Ebner mine and went out and brushed out from the Lotta stake in a southerly direction; (P. R. p. 163) and that he proceeded to brush out the southwesterly side line of the Lotta claim, and referring to plaintiff's Exhibit "N" (found at page 1850 of the record), stated that he started to brush out at Post No. 5 of the Lotta claim and brushed along the southwesterly side line of that claim to corner No. 6 of said claim and continued to brush along such line down to near the creek, and made a somewhat preliminary survey of the Parish No. 2 claim. (P. R. p. 167.) That he then proceeded to brush out the boundaries of Parish No. 2 claim and proceeded to set the northeast corner post of the same, and referring

to the corner posts of the Lotta claim and to plaintiff's exhibit "N", the witness stated that he called post No. 6 the northwest corner post and post No. 5 the southwest corner post. Witness still further stated that he set big alder stakes, some of them three inches in diameter, at all corners of the Parish No. 2 claim, and that the Parish No. 2 claim and the Lotta claim had one side line in common almost throughout its entire length, and that witness sought this method of staking out the Parish No. 2 claim in order to tie it up to the Lotta claim. (P. R. pp. 165-6). And also that a location stake was set near the center of the southwesterly end line of said Parish No. 2 claim, near what is termed "open cut" on Exhibit "N", and also within a short distance of the discovery made at the Borean pit; and that he followed on down the center of Parish No. 2 lode claim and made a discovery at or near the bank of the creek in the center of the claim. (P. R. p. 180).

Witness then testified that he was on the claim again in 1908, and that whatever new stakes were needed that he reset them. (P. R. p. 201).

LLOYD G. HILL testified that he was on the ground embraced in the Lotta and Parish No. 2 claims in the year 1898 and aided and assisted in running the southwesterly side line of the Lotta claim, which is marked between the figures 5-6, and that he was over both the Lotta and the Parish No. 2 lode claims in the year 1904, when he made an official survey of the Colorado lode claim belonging

to the defendant in error, and that he saw the stakes of the Parish No. 1 and No. 2 in 1899, and that during the time that witness was making the survey of the Colorado claim in 1904 he saw the stakes at the corners of the common end line between the Parish No. 1 and Parish No. 2, and this would be the southeast end line of Parish No. 2 and the northwest end line of Parish No. 1 and between corners numbered 3-4 on Exhibit "N." (P. R. pp. 252-253.) found other stakes. (P. R. pp. 280-281.)

That witness at the same time saw posts Nos. 5 and 6 of the Lotta lode claim, as indicated on Exhibit "N" and they were in the same place when he saw them in 1899. (P. R. 251-252). The witness further stated that he was again on Parish No. 2 mining claim in 1908 and assisted Mr. Wettrick, U. S. Deputy Surveyor, in making some surveys in that neighborhood, and that at that time he saw the stakes of the Parish No. 2 claim in the same place in which he had formerly seen them.

F. J. WETTRICK, U. S. Deputy Surveyor, testified that he made a survey of the Parish No. 1 and No. 2 claims in the year 1908 for the purpose of locating the corners of these two claims. (P. R. p. 279). That at that time he ran the westerly or southwesterly side line of the Lotta claim, he saw a stake which was 5x5 inches and stood two feet above the ground, and that he ran several other lines of the Parish No. 2 and the Lotta claims, and found other stawes. (P. R. pp. 280-281).

The witness further testified that in 1910 he

made an official survey for patent of the Parish No. 2 and referring to Exhibit "N" found corner No. 5 on the side line common to Parish No. 2 and the Lotta lode claim, also monument No. 3 of the Parish No. 2 lode claim, and the monument at the intersection of the Forrest lode with the side line of the Parish No. 2 and the Lotta; also monument No. 2 of the Parish No. 2 lode claim, which is the same as monument No. 1 of the Parish No. 1 lode claim. (P. R. p. 283).

All of the foregoing evidence and testimony is undenied, and we submit to the court that if the same is true, that the Parish No. 2 lode claim was properly staked and marked upon the ground by brushing out the exterior boundary lines of said claim and setting of proper monuments and maintaining the same, and that the said claim was properly tied up in the location notices thereof to a permanent monument, hence, the Court should have made our finding tendered to this effect.

(*b*)—*Under this subdivision, as hereinbefore stated, we contend that since the discovery, location, staking, etc., of the Parish No.* 2 *lode mining claim, that the plaintiff in error and its grantors have, each and every year since the year* 1899, *that being the year of the location of the claim in question, fully performed the annual assessment work on said mining claim and have fully complied with the laws of the United States and Alaska in this respect.*

The Trial Court found that for the years 1909 *and* 1910 *that the plaintiff in error complied with the above mentioned laws and did do and perform a sufficient amount of labor and work upon said mining claim to comply with the law regarding the doing of annual assessment work upon mining claims in Alaska* (P. R. p. 88). *The printed record is so large and voluminous in this case and the Trial Court having found that we had not complied with the law in regard to the doing of annual assessment work on this mining claim in question for the years* 1900 *to* 1908 *inclusive, we deem it necessary, to save this Honorable Court much labor, to segregate from the massive record all of the testimony and evidence given on the trial of the case pertaining to the annual labor and assessment work done and performed for the years* 1890 *to* 1908 *inclusive, and we are of the opinion that when this is done, that we will have shown plainly to this court that the Trial Court erred in its finding in respect thereto.*

WILLIAM EBNER, a witness on behalf of the plaintiff, substantially testifies as follows:

That he resided in Juneau, Alaska, from 1890 up to about eight months preceding the commencement of this action; that during all of said time, he was engaged in mining. (P. R. p. 138.)

Witness identifies plaintiff's Exhibit "B,"

being a map showing group of mining claims, among which is the Parish No. 2. (P. R. p. 153.) (See also map P. R. p. 1809.(That he first became acquainted with the mining property in 1891. (P. R. p. 154.) That he located the Parish No. 2 mining claim by staking out and marking the boundaries, etc. (P. R. p. 160.)

Testifies to posting notice, etc., and identifies location notice recorded in the office of the Commisioner of the Juneau Recording District, Alaska, as copy of the notice so posted upon Parish No. 2 claim. (P. R. p. 161.) That he saw such notice upon said claim a year and a half afterwards. (P. R. p. 161.)

Q.—Who built that monument in the first instance?

A.—I did. (P . R. p. 201.)

Q.—When you first staked the claim?

A.—Yes, sir. (P. R. p. 201.)

Witness states that this was the lode line stake.

Witness states that he was on the Parish No. 2 claim last fall, and saw some of the original stakes on said claim. (P. R. p. 203.)

Q.—What year did you first commence doing assessment work on the Parish No. 2.

A.—In 1900.

Q.—Mr. Ebner, I will ask you if you have any records or recollection as to the number of days' work that was done on this claim in the year 1900?

A.—No. I couldn't go into detail. I put my men—took them out there and kept them to work at their regular wages until I had performed $100, *until the required amount of money or work had been done and money expended at their regular wages. One man would get* $2.00 *and his board and the other probably* $2.50. (P. R. 205.)

Q.—I will ask you what kind of work and the character of work you did in 1900 *in performing your assessment work on this claim?*

A.—We made an open cut on the Parish No. 2 *just above the creek, where there is a very heavy spring comes out. We made an open cut there and then went to work and turned in some water and commenced, and did, I think, wash out or partially so, so as to get down to the surface, to the bedrock, one ditch leading towards this open cut. I don't remember just the value of each one separately, but those two items together cost in actual expenditure, wages paid to men, more than one hundred dollars.* (P. R. p. 206.

Q.—How much did that improve that claim as a mining claim?

A.—I consider that it improved it at least the amount of money expended. (P. R. pp. 206-207.)

Witness testifies that in 1900 they brought the water to said claim from said Snowslide Gulch by ditch, etc.; repaired the old dam, etc.,

cut the roots and sod down to bedrock leading to this open cut, for the purpose of exposing the bedrock. (P. R. p. 207.)

Q.—You said something about a dam being up there and some stream that comes down from Snowslide Gulch. Explain to the Court the nature of that dam that was there in 1900.

A.—Well, the dam, is in a narrow point and there is a ditch cut on the side—this is in Snowslide Gulch itself—and it is a natural dam to a certain extent, and a dam that was built there years and years ago and a portion of the old dam is still there, and every year a portion of the snow and rock and snowslides takes off the top and that has to be rebuilt to throw the water into the ditch and divert it. (P. R. pp. 207-208.)

Witness states that the object in keeping up the dam was to use water for sluicing and developing the Parish No. 1 and Parish No. 2 mining claims. (P. R. p. 208.)

Q.—What do you mean by sluicing on a quartz claim?

A.—Sluicing—that is to wash off the surface and expose the bedrock. (P. R. p. 208.)

Q.—Then, the next year, 1901?

A.—In 1901 *we continued this same work and done practically the same thing. I think in* 1901 *we completed this ditch across, or very near across, the claim.* (P. R. p. 208.)

Witness testifies that the value of the work

in 1900 and 1901 on said Parish No. 2 claim, and the amount paid out for such work for said years, was more than one hundred dollars each year. (P. R. p. 209.)

That in 1902 work was done altogether on ditches to the witness's best recollection, and that such work uncovered the formation of the ground in the mining claims. (P. R. p. 210.)

Q.—In doing this sort of work, from a miner's standpoint, do you wash away the dirt and expose the vein so as to judge of its value and the formation, etc., of the claim?

A.—Yes, sir. (P. R. p. 210.)

Witness testifies that the amount paid for the work and labor done upon Parish No. 2 mining claim in 1902 was fully one hundred dollars, probably a little more than one hundred dollars. (P. R. p. 211.)

That in 1903 these ditches and open crosscuts were continued and the ground thoroughly prospected where these ditches had been made the year before. (P. R. p. 211.)

The Court upon motion of counsel for defendant struck out that portion of witness' answer in which he stated he thoroughly prospected the ground. (P. R. pp. 211-212.)

BY THE COURT:—You can state in a detailed way Mr. Ebner, what work you did—what this work consisted of.

A.—Why, it was stripped down to bedrock, so I could get to the bedrock and I took as-

says to ascertain where the values, if any, existed across this claim. I found that there were values and then I made, that same year, we built a blacksmith shop and started the approach or what you might say squared up for a tunnel. (P. R. p. 212.)

Q.—This work that you have been doing these years that you have dsecribed—I will ask you, Mr. Ebner, what was the purpose of performing this kind of work on this claim?

A.—In the first place, I found some values when I located the ground. I wanted to ascertain if there was more values and where they were, for the purpose of starting a working tunnel and thoroughly and systematically and in a business-like way develop the claim. That was the purpose of it. (P. R. p. 212.)

Q.—I will ask you if you did start such tunnel?

A.—Yes, sir. (P. R. p. 212.)

Q.—What year did you start the tunnel?

A.—In the year 1903. (P. R. p. 212.)

Q.—Do you remember approximately upon what portion of the claim you started this tunnel?

A.—On Parish No. 2. (P. R. p. 212.)

Q.—What portion of the claim?

A.—Near the center of the claim, very near the center of the claim, I should judge, both in length and width—not quite the center of the claim in width but near the center.

Witness identifies photograph marked plaintiff's Exhibit "M," which was later offered and received in evidence, showing the tunnel referred to. (P. R. p. 213.)

Witness testifies that in 1904 about ten feet of said tunnel was driven, also some work in the Borean pit; that the blacksmith shop referred to herein was built on the Parish No. 2 claim. (P. R. p. 215.)

Q.—Did you use that blacksmith shop for anything?

A.—Yes, for sharpening tools, for sharpening the drills. (P. R. p. 215.)

Q.—What were you going to do with the drills, use them?

A.—Yes, driving the tunnel. (P. R. p. 215.)

Witness testifies that the amount paid for the work done in 1904 was something over one hundred dollars. (P. R. p. 215.)

Q.—What was your purpose in running this tunnel?

A.—The purpose was to drive that in under the Parish No. 2 for the purpose of developing the claim and the work in the Borean pit was for the purpose of developing the lode as it was exposed. (P. R. p. 216.)

Q.—Now, this work that you had been doing prior to 1904,—*I will ask you whether or not that was any assistance to you in judging*

where to locate this working tunnel that you commenced?

A.—It was, the ditches and trenches I cut across were. In other words, I wanted to know if there was any value in there and where and what direction to drive, and if there wasn't anything there, there wouldn't be any use in starting a tunnel. (P. R. p. 216.)

Witness testifies that he was on the Parish No. 2 claim in 1905; that the work done on said Parish No. 2 mining claim in 1905 consisted in driving the tunnel and work upon the Borean pit but principally in the tunnel.

Witness does not remember the exact number of feet, as it was done by day's work; that the amount for the work done in 1905 on the Parish No. 2 claim was more than one hundred dollars. (P. R. p. 219.)

Witness testifies that in 1906 work was confined solely to the tunnel. That the witness examined the work for 1906; that it will appear on page 218 of the printed record that counsel for defendant in error demanded the production of the books of the Ebner Gold Mining Company showing the amounts actually paid for assessment work.

Q.—I will ask you, Mr. Ebner, if you have any of the Ebner Gold Mining Company's books here by which you can refresh your memory and tell the exact amount that was paid for assessment work on these two claims, the Parish No. 1

and Parish No. 2, *commencing with* 1902 *up to and inclusive of the year* 1906*?*

A.—I can, yes sir, from the books here. (P. R. p. 218.)

Witness produces Journal and Ledger of the Ebner Gold Mining Company. Testifies that during the years from 1900 to 1908 he was President and Manager of said Ebner Gold Mining Company. (P. R. p. 218.)

That he had supervision over the keeping of the books himself; that a Mr. Denby kept part of the time but that Denby was not at present living in Alaska.

That the entries made in the Journal were taken from the pay rolls and the pay rolls were made up from the time books kept by the men doing the work. That the entries were then made from the Journal into the Ledger. (P. R. pp. 219-220.)

Witness says the time books are not in existence. That he has failed to find them. (P. R. p. 221.)

BY THE COURT:—You say you know nothing about where the original entry is?

A.—That is in the time books?

Q.—Yes?

A.—The original entries are all in these journals, but these entries were taken from the time books; that is, for instance, the time book pertaining to the labor,—the foreman had charge of the men; he knew where his men were

working every day; he had a certain department where he kept that himself; he made a certain notation on the time book where he was working and if he worked in the Parish, he would put a mark over that day and at the end of the month he would report and then the charge would be made. (P. R. pp. 221-222.)

Witness identifies page 99 of the Ledger, being plaintiff's Exhibit No. 8 at page 1869 of the record. (P. R. p. 223.)

Q.—And as I understand it, the entries in the Ledger show the pages that these entries are found in those two other books that you term your journals?

A.—Yes, sir..

Witness testifies that in the year 1907 Oscar Harri, watchman of the Ebner property, was directed to perform work on Parish No. 2 claim; that he turned the water in and worked in the Borean pit and other work; that towards the fall of that year a man by the name of John Sawney performed work and labor on said Parish No. 2 claim and Sawney was paid something like $66.00; that this work was done for the benefit of said Parish No. 2 claim and the amount paid for such work and labor was something over $100. (P. R. p. 225.)

Witness testifies that the nature of the work was to expose the rock in this Borean pit, etc. *"It was to get on to the bed rock and expose it and prospect it and determine as to the width of the vein there."*

That witness ascertained the number of days that Oscar Harri worked on the Parish No. 2 claim in 1908 and in order to make the work sufficient for that year, engaged John Perelle to go upon said claim and drive an open cut along the trend of the ledge and told him to take a man with him for that purpose; that for this work he paid Perelle $55; that the total amount paid for the work done upon Parish No. 2 claim in 1908 was $105.00 (P. R. pp. 226-227.)

That witness examined the work done each and every year and more particularly the work done and performed i n1907 on said Parish No. 2 claim. (P. R. p. 228.)

On cross-examination, witness was asked the following question:

Q.—The ditches were part of the work in the Borean pit?

A.—No, not in the Borean pit, no. (P. R. p. 237.)

Upon being requested to show where the ditches were on the Parish No. 2 claim, witness does so. (P. R. p. 237-238.)

That witness does not remember exactly how many feet was driven in the tunnel upon Parish No. 2 claim, but it was something over 20 feet. (P. R. p. 239.)

Upon redirect examination, witness testifies that he gave Mr. Tripp, who was representing parties having an option upon the mining property of

the Ebner Gold Mining Company, plaintiff in error herein, permission to go upon said property and develop the same and to do the assessment work thereon. (P. R. p. 245.)

On recross examination, the following question was asked the witness:

> *Q.—And tell me where these items came from that made up the* $1,053?
>
> *A.—The assessment work there was not carried on to the pay roll, as I testified here once before,—in other words, it was all charged to mining on the pay rolls.* (P. R. p. 315.)
>
> *Q.—So when the segregation was made, it was more or less of a guess?*
>
> *A.—No, it was made very carefully from the time book.* (P. R.. pp. 315-316.)

Witness testifies that he increased the number of stamps on the Ebner Gold Mining Company's property from 10 to 15, etc. (P. R. p. 318.)

JOHN PERELLE, a witness called on behalf of the plaintiff, testified substantially as follows:

That he follows the business of mining; that he has lived in Juneau for 19 years; that he acted as superintendent for the Ebner mines during the years 1900 and 1901; that he knows the Parish No. 2 lode mining claim; that during 1901 he had one man working upon Parish No. 2 claim for nearly two months steady, sometimes eight or ten men for several days. (P. R. pp. 285-286-287.)

That in 1908 witness and a man named Dominick Caesar performed 10 days' work each on said Parish No. 2 claim; that said work consisted of an open cut, stripping the surface and drilling some holes and blasting. (P. R. 287-288.)

DOMINICK CAESAR was called as witness on behalf of the plaintiff in error and testified substantially as follows:

That he, together with John Perelle, did and performed ten days' assessment work each for Mr. Ebner during the year 1908. That said work consisted of open cut and cutting square the surface; that he worked at the same place that John Perelle was working. (P. R. pp. 295-296.) That witness got $3.50 per day for said work. (P. R. p. 297.)

OSCAR HARRI, witness on behalf of the plaintiff in error, testified substantially as follows:

That he is a native of Finland. That he knows the Ebner mill on Gold Creek. That he was employed by the Ebner Gold Mining Company from 1903 up to and including 1908. (P. R. pp. 297-300.)

That he knows the Parish No. 2 lode; that he did assessment work upon said Parish No. 2 in 1907; said work consisting of a ditch from Snowslide Gulch and running water through said ditch and using said water for the purpose of sluicing off the dirt from the big pit—Borean pit. That this wor kwas done at Mr. Ebner's request for the purpose of uncovering the bed rock; that, in addition to this work, witness also, in 1907, cut the brush off the ground;

that someone else assisted the witness but witness forgets the name of the party so assisting; that he worked over 60 days by himself in performing work upon said Parish No. 2 claim, and Mr. Ebner had someone else assist him in addition to said 60 days which witnes worked alone. (P. R. pp. 298-299.)

That in 1908 witness did the same amount of work and spent about the same length of time, 60 days or a little over, upon said Parish No. 2 claim. (P. R. p. 300.)

That Perelle and Caesar worked upon Parish No. 2 in 1908. (P. R. p. 300.)

H. T. TRIPP, a witness on behalf of the plaintiff in error, testified substantially as follows:

That he has lived in Alaska since 1897; that his business is mining;that he has managed and superintended mines; that had control of the work of the Ebner group of mines in the year 1909. (P. R. pp. 321-322.)

That in 1908 in company with Mr. Ebner, Wetrick and others, brushed out the common side line of the Lotta and Parish No. 2. (P. R. pp. 322-323-325.)

That he did considerable surveying, topographical surveying, assaying etc., at different points upon the Ebner mining property, including the Parish lode claim. (P. R. pp. 328-329.)
(P. R. pp. 328-329.)

That the purpose of said work was to locate a tunnel for the benefit of the Ebner group of min-

ing claims, including the Parish No. 2 (P. R. pp. 333-334.)

Witness further testifies that the present tunnel on the Cape Horn lode mining claim (a short distance below Parish No. 2 side line) was the place or nearly the place where he had determined to drive a tunnel for the purpose of developing and opening up the entire group of lode mining claims, included within which is the Parish No. 2. (P. R. pp 347 and 351.)

That said tunnel he proposed would run along the same general line as the tunnel now being driven. (P. R. p. 351.)

F. J. WETTRICK, U. S. Deputy Surveyor, testified, with regard to amount of work shown in his surveys on the Parish No. 2 claim, as follows:

That the total value for the tunnels is $960.00 and the open cut work $100.00, making $1096.00 for the tunnels and open cut; that he took only that work that was plainl yvisible upon the claim, and that was all that was mentioned in his returns except the road that was built. That there were two tunnels upon the Parish No. 2 claim, each with a length of 32 feet and the upper tunnel was driven in 1910; that there is also an open cut 19 feet long. (P. R. pp. 606-607.)

* * * * * *"I did not list in my returns as improvements, development work, because I saw that I had enough actual work done by tunnel work and open cut work, so that I did not have to hunt up and measure up the Borean placer pit and the smaller coverings of the veins over the claim; just plainly*

visible and easily determined work that was done upon the claim." (P. R. p. 638.)

Witness further testifies that he had a conversation with Mr. Mackay, superintendent for the plaintiff company, and recommended that it would be better to have some more tunnel work done because of the fact that some of the other work had caved in, as is the habit there, and would not show up plain enough and that he wanted to be sure that there was enough visible and permanent work, etc. (P. R. p. 641.)

We have, therefore, conclusively established the Parish No. 2 mining claim upon the ground and shown absolutely by uncontradicted evidence the validity of said claim so far as the staking, marking of the boundaries and discovery is concerned; and have, from the foregoing evidence, conclusively established beyond any doubt, and absolutely without contradiction, the annual expenditure of $100 each and every year from 1900 to and including the year 1908 for work and labor actually done and performed upon the claim itself within the time required by law in each of the years aforesaid.

> "The question of 'benefit to the claim' can only arise when the work itself was done on some claim and it is sought to utilize it for the benefit of another claim held by the same party or where it is outside of the claim proper in the shape of road building, ditch, etc." (Mor. Mining Rights, 14 Ed., 120.

"It is only when labor is performed without the boundaries of the claim that its character becomes material, and in that case it must tend to the development or improvement of the claim or it will not count." (Wailes vs. Davies, 158 Fed., 667.)

"If work is actually done within the limits of the claim in good faith for the purpose of developing it, strict compliance with the requisite of the statute is established, and a court will not attempt to substitute its own judgment as to the wisdom and expediency of the method employed for developing the mine in place of that of the owner." Lindley on Mines, 2d Ed. Sec. 629, p. 1162 and cases cited.

All the evidence on behalf of the defendant in error to contradict the positive testimony of the witnesses of the plaintiff in error as to work and labor done upon said Parish No. 2 lode claim and the actual amount paid therefor, as hereinbefore stated, was for the purpose of showing, or attempting to show, that such work and labor did not benefit the claim and visible evidence of the same was not shown fully upon said claim. And all of this testimony of the defendant in error was for the purpose, evidently, of forfeiting the rights of the owner in and to the said Parish No. 2 claim and to establish the validity of the Canyon and Oregon claims. However, the two last named claims were declared invalid and void locations; consequently, the effect of the trial judge's finding in this regard would be

to forfeit absolutely to the Government the ground embraced within the Parish No. 2 lode mining claim —that is to say, turn it over to the public domain. The Government is not a party to the suit—it is not seeking to declare the Parish No. 2 mining claim public domain and that the expenditure of at least $100 each and every year upon said claim as mineral ground by the owner is money thrown away and that such owner shall lose his rights.

We cannot refrain from stating that such a finding is tantamount to making the Government a silent party to the suit merely for the purpose of declaring the ground public domain so as to establish the easement over the same, which the defendant in error is seeking to obtain. And this forfeiture is not pleaded until all the evidence has been submitted and the plaintiff in error and defendant in error rested their respective sides of the case.

> "Forfeitures are deemed odious in the law, and the evidence to sustain them must be clear and convincing. Every reasonable doubt will be resolved in favor of the validity of a mining claim, in opposition to a forfeiture." (Loeser vs. Gardner, et al, 1 Alaska Rep., 641; Wulff vs. Manuel, 23 Pac. 723; Mattingly vs. Lewisohn, 35 Pac,. 111.)
>
> "A mining location will not be declared forfeited on mere suspicion. The evidence upon which to base a forfeiture must be clear and convincing." (Thomson, et al, vs. Allen, et al,

I Alaska, Rep., 636; See also Prov. Gold. Min. Co. vs. Burke, 57 Pac., 641; Ames vs. Kruzner, et al, 1 Alaska Rep., 598; McCullouch vs. Murphy, et al, 125 Fed., 147; Whalen Consol. Cop. Min. Co., vs. Whalen, et al, 127 Fed., 611; Hammer vs. Garfield Min., Etc., Co., 130, U. S., 291; Lockhart vs. Johnson, 181, U. S., 516.

"The law does not favor forfeitures. It is true that it has been held, in cases where it has been sought to establish a relocation of a mining claim, that the bona fides of the prior locator might be taken into consideration in determining whether he had done the necessary assessment work to retain his claim. But this was held on the ground that courts are reluctant to enforce a forfeiture and will not do so, except upon clear and convincing proof of the failure of the former owner to perform the amount of labor required by law." (McKay vs. Neussler, 148 Fed., 87.)

"The statute does not require any particular character of labor; it does not require that the work shall be wisely and judiciously done nor does it say how the work shall be performed." (Wailes vs. Davies, 158 Fed., 667.)

"Any work done for the purpose of discovering minerals is improvements within the spirit of the statute." (Mor. Min. Rights, 14 Ed. 117, citing U. S. vs., Iron-Silver Co., 24 Fed. 568.)

"Flumes, drains or the turning of a stream * * * * * will count." (Mor. Min. Rights,

14 Ed., 117, citing St. Louis Co. vs. Kemp, 104 U. S., 636.)

Any resumption of work upon the Parish No. 2 lode mining claim during any of the years since its location up to the year 1907 would have been sufficient to have held the claim under the law, provided there was no intervening location of a mining claim covering the same ground prior to such resumption and continuation of the work until completed. (See Thatcher vs. Brown, 190 Fed., 709.)

However, in 1907 Congress passed an Act, applicable only to Alaska, by which a forfeiture was declared on failure to do assessment work on mining claims within the year, and in Thatcher vs. Brown, supra, a resumption of the work following year where there was a failure to do work will not save the claim from forfeiture.

It requires two parties to make a forfeiture absolute: First, the party who abandons, and second, the party who relocates. The second party therefore must take advantage of the first party's default before such default can enure to the second party's benefit. Morrison Min. Rights, 14th Ed.; Little Gunnell Co. vs. Kimber, 1, M. R., 536; Beals vs. Cone, 62 Pac., 948; Madison vs. Octave Oil Co., 99 Pac. 176.

Whether a failure to do assessment work within the year is absolutely *ipso facto*, such a forfeiture that would defeat the owner even though he was several years thereafter kept up his assessment work, and no intervening right had interposed during said

years, is not, in our opinion, a question to be considered in this case for the reason that the evidence conclusively shows that the years 1907 and 1908, when such forfeiture might occur by reason of a failure to do and perform the work within such years, stand out prominently as two years when the amount of annual labor done upon the Parish No. 2 lode mining claim within each of said years far excelled that of other years, even including 1909, the year when the Trial Court holds the annual work to have been done and performed.

In proof of this, we call special attention to the record. As already shown herein, Oscar Harri spent over 60 days upon the Parish No. 2 lode claim doing and performing work and labor thereon during the year 1907; that in addition thereto, man by the name of John Sawney was paid the sum of $66.00 for assessment work actually done and performed by him directly *upon said Parish No. 2 claim* during said year of 1907. (P. R. pp. 225, 298 and 299.)

In 1908, the same amount of work was done and performed by Oscar Harri, and the same number of days, viz: 60 days, *upon said Parish No. 2 lode mining claim;* that in addition thereto, John Perelle and Dominick Caesar each performed 10 days' work *directly upon said Parish No. 2 lode claim* during said year of 1908. (P. R. pp. 226, 287, 288, 296, 297 and 300.)

Oscar Harri was watchman upon said mining proerty of the Ebner Gold Mining Company, including the Parish No. 2 mining claim, and was in charge

and constantly upon said mining property, as such watchman. The services of watchman, however, are not included in any of the work described as assessment work. (P. R. pp. 275 and 276.)

It will further appear from the testimony hereinbefore quoted that $3.50 per day were the going wages for doing and performing assessment work in Southeastern Alaska during said years.

It will appear from the record that the annual assessment work on the Parish No. 2 claim in 1909, the year the Trial Court holds the assessment work to have been done, was 51 days' labor done upon said claim, which consisted in digging roads, chopping trails and crossing and recrossing over the great thickest of brush and building a dam to turn the water through a ditch to run down onto said Parish No. 2 claim. (P. R. pp. 336-8.)

We consider, and the evidence clearly supports us, that the finding of the Trial Court that the annual labor upon said Parish No. 2 claim *was not done in* 1907 *and* 1908 and *was done in* 1909 is arbitrary, inconsistent and unreasonable, and unsupported by any evidence whatsover in this case.

As a corollary, if the work was done in 1909 there can be no question or reasonable dispute but that the work was certainly done in the years 1907 and 1908.

There is no question involved in this writ of error of a relocation of a valid subsisting mining claim covering the ground embraced within the Parish No. 2 claim by reason of forfeiture owing to a

failure of the owner of said Parish No. 2 claim to do the annual labor thereon. There is absolutely no question of conflicting ownership to the ground embraced in said Parish No. 2 claim between the parties to this action to be considered by the Appellate Court, for the Trial Court has determined and found that the defendant in error has no title to any mining claim conflicting with the Parish No. 2, and no writ of error is presented from such finding and decision.

Absolutely disregarding the allegations of the pleadings by which the plaintiff in error and defendant in error are claiming the ground in dispute as mining claims, and the testimony of all the witness that said ground is mineral, each side claiming discovery, the Trial Court determines that neither party has a discovery; that the ground is non-mineral; and that plaintiff in error forfeited its mining claim by failure to do the annual labor; and segregates from a well known group of mining claims in Silver Bow Basin, nearly all of which are patented and some of which have produced ore that has been mined and milled at a profit, and considered to be the greatest lode belt in the Territory of Alaska. And what is the result of such a decision? Simply to relinquish the U. S. public domain ground which has absolutely no other value than as mineral ground.

IV.

The Court further erred in making the following Finding No. 8, in which the Court finds in substance:

That under the custom of miners in Harris Mining District, being the district in which Parish No. 2 mining claim is located, that appropriators of water had uniformly the right to build ditches, etc., across unpatented mining claims owned and held by others * * * * *.

And also Finding No. 2 in which the Court finds substantially:

That under the customs of miners the riparian proprietor has no right to the use of water of running streams by reason of such riparian ownership, as against a prior appropriator, and that the defendane went upon Parish No. 2 lode mining claim to construct a dam, etc., for the purpose of diverting and appropriating the water to be used in running a stamp mill, etc.

As already argued in this brief, we cannot conceive how the question of appropriation of water and the easement by flume line across the Parish No. 2 claim can be considered. However, from the findings of the lower Court, holding in effect that under the customs of miners generally observed by the miners of the Harris and surrounding mining districts, that the appropriator of water has uniformly exercised the right to build ditches and conals across unpatented mining claims, etc., it probably revolves upon us the necessity of making reference and to some extent quoting substantially the evidence contained in the record upon which such finding is based.

The defendant in error called quite a number of witnesses to show that, under the customs of

miners in the Harris Mining District, appropriators of water have the right to cross unpatented mining claims which had been taken up and segregated from the public domain prior to any diversion or appropriation of water.

BENJAMIN BULLARD, the first witness called in this connection, testified substantially as follows:

That he has resided in Juneau about ten years and that his business during such time has been mining.

Witness pretends to state how appropriation of water may be made under the customs of miners. (P. R. p. 1075.)

Witness further states that, under the customs of miners, an appropriator of water has the right to cross over unpatented mining property. (P. R. pp. 1077-1078.)

Upon cross-examination this witness says that he has no personal knowledge of a single instance in Southeastern Alaska where a ditch crossed over an unpatented mining claim without the consent of the owner of said claim. Witness admits absolutely that he has had no personal experience concerning the matter and all that he testifies to is from hearsay. (P. R. pp. 1079-1080.)

GEORGE HARTRADER, the second witness called by defendant in error upon this point, testified substantially as follows:

That he has lived in Juneau thirty years; that

he is known as the builder of the original Hartrader ditch is known as the Hartrader Ditch or the Coombs & Campbell Ditch. (P. R. p. 1083.)

Witness states that he knows to some extent the customs of miners with reference to the appropriation of water and the acquisition of water rights in the Harris Mining District and surrounding districts. This witness further states that under such customs a man who owns the banks of a stream would have a perfect right to use the water in the stream. (P. R. p. 1084.)

Witness then states what is necessary with reference to the appropriation of water. (P. R. p. 1084.)

Q.—What rights under the customs of miners in this locality has one seeking to acquire a water right by diversion and application to a beneficial use to build ditches, flumes, canals, aqueducts, and intakes on the mining claims, whether quartz or placer, necessary for him to cross in order to divert the water and apply it to the beneficial use desired?

A.—The way we done in the early days in the Basin, we crossed over that man's claim with our water ditches and flume. (P. R. p. 1085.

Witness states that he could not give the names of more than one company over whose ground he crossed with the ditch line. (P. R. p. 1086.) Witness also mentions the ground of two or three individuals over which the ditch crossed. (P. R. pp. 1086-1087.)

On cross-examination witness testified that the ditch he had reference to was dug for the purpose of conveying the water to placer mines (P. R. pp. 1087-1088); *that the ditch right was the oldest right on the creek, but he couldn't say whether the ditch was taken up before the claims over which the ditch crossed or not.* (P. R. p. 1088.)

That at that time there was no quartz mills in and about Juneau and there were no other ditches of any consequence in Southeastern Alaska at that time. (P. R. pp. 1088-1089.)

That since that time there have been a number of quartz mills built and witness does not know anything about the custom that has prevailed with those companies in crossing lands owned by others. (P. R. p. 1089.)

Witness testifies to a miners' meeting in the early days and the passing of by-laws, rules, and regulations (P. R. p. 1089); that there was nothing said in the by-laws and regulations about the right to cross anybody's land to witness' knowledge. (P. R. p. 1090.)

That the only case he knows of is the Hartrader ditch which he built, as testified to. (P. R. p. 1090.)

CHARLES BOYLE, the third witness called by defendant in error to prove the miners' customs, etc., testified:

That he has resided in Juneau since 1886 and has followed the business of mining ever since coming to Juneau. (P. R. p. 1091.)

This witness also attempts to state how water is appropriated, etc., under the customs of miners. (P. R. p. 1091.)

That it has always been the custom to convey water across another man's ground. (P. R. p. 1092.)

Q.—Could the man who owned the ground stop you from doing that, under the custom?

A.—Not as I know of. I think it was customary always. (P. R. p. 1092.)

Witness further states that he knows the Hartrader ditch and also knows that that ditch crosses the ground owned by Luke Nolan and his partner and also of six or seven claims. (P. R. p. 1093.)

Witness believes that some of the mining claims were located before the ditch was built. (P. R. p. 2094.)

On cross examination witness states that he never knew of a man going on a claim owned by another and taking the water from the creek which such claim crossed in Alaska. (P. R. pp. 1095-1096.)

That he has known of a man going on public domain appropriating water and conveying it by ditch over the claim of others. (P. R. p. 1096.)

Witness further testified that there were three or four partners connected with the Hartrader ditch; that Coombs was one of the partners; that this ditch crossed over Coombs' quartz claim.

Testifying as to the Coombs & Hartrader ditch, the following testimony appears in the record, viz:

Q.—Hartrader & Coombs took the water down to work on the placer claims?

A.—Yes, sir.

Q.—What did you say the other ditch is that you knew up there in early days?

A.—The first ditch was—there were three or four partners in it—Coombs was in it and Hartrader, too. (P. R. p. 1097.)

Q.—What creek did they take the water from?

A.—The lower ditch was taken out of Icy Gulch. (P. R. p. 1097.)

Q.—Where is that gulch up there with respect to the Perseverance or the Alaska-Juneau property?

A.—It comes right straight down from the mountain—the Alaska-Juneau runs right up against it. (P. R. p. 1097.)

Q.—That is where those people took it?

A.—Yes. (P. R. p. 1097.)

Q.—They went way up on the hillside and took up the water and then took a ditch around and across some other people's property?

A.—Yes, sir. (P. R. p. 1097.)

Q.—They went on Government land and took the water too—went way up and got it on land nobody owned?

A.—Of course, nobody owned it at that time. (P. R. p. 1908.)

On page 1099 this witness testifies that before crossing over any one's land with a ditch, that the

consent of the owners of said land was first obtained. (P. R. p. 1099.)

That the only thing witness knows about the custom is the custom which prevailed in the early days when there was placer mining going on. (P. R. p. 1099.)

HUGH TRACY, the fourth witness called on behalf of defendant in error to testify with reference to the miners' customs, stated:

That he has lived in Douglas, Alaska, about twenty-five years and his business has been prospecting and mining ever since. (P. R. pp. 1100-1101.)

This witness also attempts to testify with reference to the customs of miners and says that he thinks under the custom they had a right to cross over ground owned by others for the purpose of conveying said water. (P. R. p. 1102.)

That he worked on the Campbell & Coombs ditch. (P. R. p. 1102.)

On cross examination this witness testified that the only ditch he knows anything at all about in the Silver Bow Basin is the Hartrader. Cooms & Campbell ditch. (P. R. p. 1103.)

Q.—Do you know anybody's mining claims that the ditch crosses?

A.—Yes, my own. (P. R. p. 1104.)

Q.—When did you locate your claim?

A.—Four or five years ago. (P. R. p. 1104.)

Q.—The ditch was there when you located the claim?

A.—Yes. (P. R. p. 1105.)

Q.—Who else owns any claim there that they cross?

A.—I don't know. (P. R. p. 1105.)

Q.—And it is from this knowledge that you have that you testify to the general custom that Mr. Hellenthal has questioned you about?

A.—That is all. (P. R. p. 1105.)

VICTOR LUNDQUIST, the fifth witness called on behalf of the defendant in error with reference to the customs of miners, testified:

That he has resided in Juneau since 1887 and worked in mines; that he has never helped to build anw ditches; that he does not know the customs of miners. (P. R. p. 1105.)

In answer to a question as to what right any one had to build ditches and canals across mining claims under the customs of miners, witness answered as follows:

A.—They have a right providing he gets the right from the man who has a right to the water first—he has to get permission from him to get the water out of the creek and build a flume and get the water. That is the way I understand it.

Q.—If a man is trying to get water from the creek to the water right and there is a mining claim between him and the creek, has he

the right to cross that with his ditch under the custom of miners as you understand it?

A.—I don't know anything about that. (P. R. p. 1106.)

CHARLES MORSE, the sixth witness called on behalf of the defendant in error with reference to the customs of miners, testified:

That he has lived in Juneau since 1882 and has been mining more or less since he came to Juneau. (P. R. p. 1106.)

Witness says that in Montana and other places they have crossed different claims with ditches. (P. R. p. 1107.)

On cross examination witness says that he never operated any mines in Silver Bow Basin and never ran any ditches across anybody's land in Alaska. (P. R. p. 1108.)

That the only ditches he knows about are the Hartrader ditches. (P. R. p. 1108.)

That he does not know any more about that than they have told him. (P. R. p. 1109.)

That he attended a miners' meeting in the early days; that there has been no miners' meetings for fifteen or twenty years and not since the Courts were established in Alaska. (P. R. p. 1109.)

THOMAS WILSON, the seventh witness called on behalf of the defendant in error with reference to the customs of miners, testified:

That he has lived in Alaska since 1884. That he has mined about forty years. (P. R. p. 1110.)

Q.—Do you know the custom of miners in the mining district surrounding Juneau and the Juneau gold belt?

A.—I never seen any in Juneau to know anything about them. (P. R. p. 1110.)

On cross examination witness states that he came here (Juneau) in 1884. (P. R. p. 1110.)

That he knows that prior to his coming here there was an organization of what is called the Harris Mining District. (P. R. p. 1111.)

That he never attended any meeting of the miners in the early days; that they held one meeting in 1885; that it was a rough affair and witness went away; that there has been no attempt since that time to hold a meeting of the miners; that there has never been any attempt to live up to those miners' rules and regulations since 1885. (P. R. p. 1111.)

DAN KENNEDY, the eighth witness called on behalf of the defendant in error with reference to the customs of miners, testified:

That he has lived in Juneau since 1881 and followed mining the first two years, viz: 1881 and 1882. (P. R. p. 1112.)

This witness states that before crossing mining claims of others you had to ask them for the privilege under the miners' rules. (P. R. p. 1113.)

Q.—How was it since?

A.—There was nothing about it since that I know of. It appeared there was nobody want-

ed the water but what was using it. (P. R. p. 1113.)

Q.—Who had the right to take up water?

A.—Anybody had the right to take up water where it was Government land. (P. R. p. 1113.)

CHARLES HOUSER, the ninth witness called on behalf of defendant in error with reference to the customs of miners, testified:

Tht he came to Juneau in 1886 and has followed mining and prospecting mostly since that time. That he does not know anything about the customs of miners in the Harris Mining District and other mining districts adjoining the Harris Mining District. (P. R. p. 1114.)

CHARLES MALLOY, the tenth witness called on behalf of defendant in error with reference to the customs of miners, testified that he knew nothing about the matter. (P. R. pp. 1114-1115.)

I. N. MOORE, the eleventh witness called on behalf of defendant in error with reference to the customs of miners, testified:

That he has lived in Juneau since 1886 and has followed the business of mining and boating. (P. R. p. 1117.)

That he does not know definitely the customs or practice. (P. R. p. 1118.)

This witness states that he only has a supposition and that is that a man can go on the United States Government's land and locate the water, but that he could not go upon a claim located by another

for the purpose of taking such water. (P. R. pp. 1119-1120.)

M. S. HUDSON, the twelfth witness called on behalf of defendant in error with reference to the customs of miners, testified:

That he has lived in Southeastern Alaska eighteen years. That up to the last three years he has followed mining. (P. R. p. 1155.)

That he has worked properties as owner and as superintendent of the Nevada Creek property, located on Nevada Creek (Douglas Island, Alaska) (P. R. p. 1156.)

This witness also attempts to give the customs of the miners with reference to appropriation of water. (P. R. p. 1156.)

With reference to crossing mining claims of others, this witness testified:

> *A.—As a rule, where it is necessary to cross their claims, as we have done down there, we got across wherever it is the most convenient place to get the water, because a good many times you can't always take it out of the creek—you have to take it on the sidehill to get a fall to it—you usually take the most convenient point to get it out of the creek.* (P. R. p. 1157.)
>
> *Q.—It makes no difference whether one happens to be on another man's mining claim or not, in using it?*
>
> *A.—Never made any difference to us around there in using it.* (P. R. p. 1158.)

Witness testifies that he has taken the water out of Nevada Creek across what is known as the Corbus claims, which are quartz claims, belonging to J. P. Corbus and Mr. Mills; that he did not ask Corbus' consent or permission to cross it and nobody interfered with his crossing said claims;that this was fourteen or fifteen years ago. (P. R. p. 1158.)

That they dug a ditch across the Spread Eagle claim, owned by a man named Cleever, which was built six or seven years ago. (P. R. p. 1159.)

Witness does not know whether or not Cleever's permission was ever asked to build said ditch. (P. R. p. 1159.)

On cross examination witness testified:

Q.—In bringing that water down you crossed some claims belonging to J. P. Corbus, who used to be superintendent of the Alaska-Treadwell Company?

A.—Yes, sir. (P. R. p. 1161.)

Q.—How many claims did he own?

A.—He owned two claims and two fractions. (P. R. p. 1161.)

* * * * *

Q.—That group of claims now belongs to the Alaska - Treasure — those two Corbus claims?

A.—Yes. (P. R. p. 1161.)

Witness says he does not know what arrangements were made with Corbus to go across said claims. (P. R. p. 1162.)

He further states that he does not know when the water was located; does not know whether or not the water was located before or after the mining claims were located or not. (P. R. p. 1152.)

That he was the superintendent of the Alaska-Treasure group of claims for about six years and that the Corbus claims now belong to the Alaska-Treasure. (P. R. pp. 1161-1162.)

That Cleever never made any objection to witness taking water off his claim; that Cleever had never used it; that Cleever died a few days ago. (P. R. p. 1164.)

R. A. KINZIE, the thirteenth witness called on behalf of defendant in error with reference to the customs of miners testified:

That he is superintendant of the defendant in error. (P. R. p. 1167.)

That he knows the customs of the miners in the Harris Mining District and surrounding mining districts. (P. R. p. 1170.)

He attempts to state how appropriation of water is made under the miners' customs. (P. R. pp. 1171-1172.)

Witness testifies the custom is to extend ditches over property belonging to others, the only restriction being that you cannot interfere with a man's working or cause him damage. (P. R. p. 1173.)

That an owner of a ditch has a right to cross over a mine that is located before the ditch, but a ditch owner has to take care of the property. (P. R. p. 1173.)

Witness testifies to a ditch constructed across a claim of Captain John Johnson without his permission. (P. R. pp. 1181-1182.)

Witness also testifies of ditches and flumes crossing over the Bear's Nest ground and part of the Jersey City, but that the water is taken from the public domain. (P. R. p. 1183.)

Also, the ditch and flume line crossing over the ground of Dolan at Sheep Creek. (P. R. p. 1185.)

Further, of a ditch that starts on the property of the Yakima Gold Mining Company. (P. R. p. 1185.)

That no consent was obtained to cross over such property. (P. R. p. 1186.)

Also, a ditch at Berner's Bay crossing over other property. (P. R. p. 1186.)

That the intake of such ditch is on the property of some one other than the Berner's Bay Company. (P. R. p. 1187.)

On cross examination witness testifies that the main Treadwell ditch was here when he came. (P. R. p. 1190.)

That he does not know whether Captain Johnson owns the mining claim or not, that he was simply told that he did; that the assessment work on the Johnson claim has not been done during the last few years and that it is now an abandoned property. (P. R. p. 1191.)

That he does not know who owns the Yakima porperty. (P. R. p. 1192.)

That the big Treadwell ditch that traverses the mountain side was constructed long before the witness came to Alaska, and the extensions were either over Government land or ground belonging to the company. (P. R. p. 1194.)

That the ditch crossing what is known as the Shattuck property was over that property before the witness came to Alaska. (P. R. p. 1195.)

That the ditch was over the Bear's Nest property before the witness came to Alaska; that the water rights in Sheep Creek are in litigation. (P. R. pp. 1196-1197.)

That the Ready Bullion Creek is one of the oldest locations on the Island and was in operation when the witness came to Alaska, and he does not know individually or personally by what right or agreement permission was given to convey water across such claims. (P. R. pp. 1198-1199.)

THOMAS McCONNEY, the fourteenth witness called on behalf of defendant in error with reference to the customs of miners, testified:

That he has resided in Juneau since 1885 and has followed mining and prospecting. (P. R. p. 1209.)

This witness has never owned any ditch or flume line, but has helped to build them. (P. R. p. 1210.)

> *Q.—What flumes did you help to build?*
> *A.—I helped to build, not a flume, but a ditch, in the Silver Bow Basin—* * * * * *
> *—it was sometimes called the Hartrader*

ditch and sometimes the Bulger. (P. R. p. 1211.)

Witness does not know what arrangements, if any, were made with reference to crossing anybody's property. (P. R. p. 1211.)

This is the only experience he has had with reference to ditches in Alaska.

GEORGE MILLER, the fifteenth witness called on behalf of defendant in error with reference to the customs of miners testified:

That he has resided in Juneau twenty-four years and had been engaged in the mining business, both quartz and placer mining. (P. R. p. 1211.)

Witness testifies that appropriator of water just crosses ground so long as no interference with the claim. (P. R. p. 1212.)

That he has built ditches across placer and bench claims. (P. R. p. 1213.)

That he has taken water off the claim of Maloney & Dalton. (P. R. p. 1213.)

On cross examination this witness states that all this was done on Porcupine Creek (about 100 miles from Juneau) (P. R. p. 1213.)

That there was a mutual understanding among the people in Porcupine; that he knows nothing about ditches up in Silver Bow Basin; that the ditch in Porcupine is the only experience he has had. (P. R. p. 1214.)

PERRY WELLS, the sixteenth witness called

on behalf of defendant in error with reference to the customs of miners testified:

That he has lived in Juneau since 1896. His only experience with ditches was one ditch in Porcupine and they "spoke to the boys about it and went through with it." (P. R. p. 1216.)

That the ditch that he has reference to took the water off Government land and they never obtained any permission to cross other claims excepting more than spoke to them about it. (P. R. p. 1216.)

JOHN KOCKHART, the seventeenth witness called on behalf of defendant in error with reference to the customs of miners testified:

That he has lived in Alaska eight years and has followed mining. (P. R. p. 1218.)

That he is not well acquainted with the miners' rules; that he does not know whether it would make any difference in taking the water off a mining claim or whether you crossed a mining claim, etc. (P. R. p. 1219.)

On cross examination this witness testified in answer to the following questions as follows:

Q.—You used to work up here with the Jualpa Company?

A.—Yes, sir. (P. R. p. 1220.)

Q.—Do you know how the Jualpa Company got is water right up there from Ebner?

A.—I think it paid for it. (P. R. p. 1220.)

Witness states that he knows of no other in-

stance in this country concerning water rights excepting the Jualpa. (P. R. p. 1220.)

———— HOWELL, the eighteenth witness called on behalf of defendant in error with reference to the customs of miners testified:

That he has lived in Juneau about ten years and has followed mining. (P. R. p. 1222.)

Witness states that he understands that a man can take up water and cross any claim as long as he doesn't do any damage, or if he does that he pays the damage. (P. R. p. 1222.)

On cross examination this witness says he has never operated any mines in Southeastern Alaska and the only thing he knows about this custom is what he has heard the people testifying say. (P. R. p. 1224.)

We deemed it unnecessary to introduce any testimony to establish the non-existence of miners' customs with reference to the foregoing, for all of the evidence in this regard submitted by the defendant in error clearly shows that no custom such as they endeavor to show exists in Southeastern Alaska.

However, the plaintiff in error asked William M. Ebner, one of its witnesses, two or three questions concerning the miners' custom referred to, and said witness positively states that no such custom prevails in Southeastern Alaska and further that he does not know of a single instance where one party desiring to cross the property of another did it with-

out the consent of the party owning the property. (P. R. p. 1293.)

There is no provision in the minutes and by-laws of the miners which provides for the crossing, by ditch or flume line, over the mining property of others. (P. R. pp. 1800-1805 inclusive.)

The evidence clearly shows that there has not been a meeting of miners of the Harris Mining District since the year 1885. In this connection, we refer the Court to the testimony of John G. Heid, a witness on behalf of plaintiff in error, and who was elected Mining Recorder of the Harris Mining District back in the eighties, to the effect that he turned over the records of the Harris Mining District to the United States Commissioner, who was designated as the proper recorder of the recording district by Judge Dawson, Federal Judge for the District of Alaska, in 1886. We quote the following answer from the record:

> *A.—The statute provides that the Court has authority, in fact, directs the Court to establish recording districts and designating the Commissioners as recorders, and it was under that organic act that Dawson made that ruling, and I delivered over the records to the Commissioner at that time, to Judge Williams, the Commissioner.* (P. R. pp. 1259-1260.)

We hardly believe it necessary to cite any authorities concerning customs of miners and their effect upon, or the consideration to be given thereto in con-

nection with, the Federal Statutes. However, in the case of Meng vs. Coffee (93 N. W. Rep., pp. 719-720) it is stated:

> *"The customs in the States to which Congress had reference were widespread and notorious. The custom attempted to be proved in this case was at best very confined in its limits, known to few, admitted by few, and, as the testimony shows, often disputed."*

We submit that all the testimony in this case shows it has always been the understanding of the witnesses testifying, that before a subsequent appropriator of water could cross over mining claims located prior to such appropriation of water, the consent of the owner of such mining claims must be first had and obtained, or at least such silence on the part of the owner of said mining claims as to amount to acquiescence.

Therefore, the attempt of defendant in error to establish a miners' custom whereby subsequent appropriators of water could cross over unpatented mining claims, etc., having so completely failed, we would ask under what law or right the crossing by defendant in error's flume line over the mining claim of plaintiff in error can be maintained?

An Act of Congress passed in 1866 (Rev. Stat., Sec. 2339), with reference to rights of way for ditches, etc., provides:

> *"And be it further enacted, that whenever, by priority of possession, rights to the use of wa-*

ter for mining, agricultural, manufacturing and other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed; provided, however, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damages."

The mining laws of the United States were made applicable to the District of Alaska in the year 1884 and consequently the Act above applies to Alaska.

"Rights held and sanctioned by general laws could not be divested by mere local rules and neighborhood customs." (Lindley on Mines, Vol. 1, p. 481, Second Ed.—citing: Waring vs. Crow, 11 Cal. 367; Dutch Flat W. Co. vs. Mooney, 12 Cal. 234.)

"The right of the United States to grant easements and other limited rights on any portion of its public domain cannot be gainsaid, and subsequent purchasers must take it burdened with such easements or other rights.

"But when it has once disposed of its entire estate in the lands to one party, *it can afterwards no more burden it with other rights than any other proprietor of lands.*"

"*The same doctrine applies to perfected mining locations.* After such location has once been completed, the estate of its owner cannot be subjected to burdens, except for some public use; or if sanctioned by the State Constitution, perhaps, for a private use, upon condemnation proceedings."

(Lindley on Mines, Vol. 1, Second Ed., Sec. 531, pp. 880-881.)

In the case at bar it will be borne in mind that the defendant in error entered upon the land of plaintiff in error and diverted the water therefrom and constructed a dam and flume line thereover for the purpose of conveying such water to some point for contemplated use.

In the case of McGuire vs. Brown (39 Pac., p. 1062) there is an extensive opinion covering the points herein involved and citing numerous authorities in support of such opinion. See also Stur vs. Beck (133 U. S. 547.)

So the only right given to cross, by a ditch, flume or pipe line, over mining claims in Alaska is that provided in the Federal Statute hereinbefore referred to, excepting, only, the exercise of the right of eminent domain provided for in the Alaska Civil Code, Sec. 210. This right of eminent domain can only be exercised in behalf of a public use author-

ized by law; and in the taking of property necessary to such public use, the complaint or petition in such proceedings must show plainly and affirmatively the existence of the statutory authority for the public use and the necessity of the purpose for such use.

Miocene Ditch co. vs. Ling, 138 Fed., p. 544.

This case presents no such situation. The water is not to be used for a public use, but, on the contrary, is to be taken from its natural channel and conveyed a distance of over a mile, for the purpose of conducting a private enterprise, viz: a stamp mill to treat the ores of the defendant in error.

There is no question in this case as to any consent being given to cross over the mining claims of plaintiff in error. In fact, as shown herein and as wil appear by the record, every possible effort was made to prevent such crossing—even to the extent of the agents and representatives of the plaintiff in error being arrested by reason of its endeavor to prevent such forced invasion of what is considered to be is legal rights.

Where a ditch is to be built across claims or lands whose owners refuse consent, condemnation proceedings are necessary under the Eminent Domain Acts, notwithstanding the right of way granted ditches by the Act of 1866.

Morrison's Mining Rights, 14th Ed., p. 230.

In the case of Vandyke vs. Midnight Sun Mining and Ditch Co. (177 Fed., p. 86), the evidence was conflicting as to whether, at the time of the con-

struction of the ditch, the plaintiffs in error objected thereto. However, the use in that case was a public one and the defendant in error thereafter brought suit to condemn a right of way over the mining claims of the plaintiff in error. But, as stated, in the case at bar there is no public use or question of eminent domain involved.

All the foregoing evidence with reference to the appropriation and acquisition of water and water rights, and the conveying of such water by flume, pipe or ditch line across the mining claims of others to the place of use or intended use thereof; and all the evidence and testimony to establish a custom among miners in Southeastern Alaska with reference to crossing over mining claims located prior to the diversion and appropriation of water,—was introduced and admitted over the objections of plaintiff in error, and to which admission of such testimony and evidence the plaintiff in error duly excepted. (P. R. 1073.)

V.

POSSESSION AND OUSTER SUFFICIENT UPON WHICH TO MAINTAIN ACTION OF EJECTMENT BY PLAINTIFF IN ERROR IN THIS CASE.

We have already shown in this brief that the evidence clearly establishes that the plaintiff in error was ousted of its possession of the Parish No. 2 mining claim. It will further appear from the rec-

ord that an action was brought by the plaintiff in error against the defendant in error to restrain said defendant in error, its agents, servants and employees from constructing a flume over and across said Parish No. 2 claim, and the opinion of the Trial Court upon the preliminary hearing and while the flume was being built, and before the same had crossed the Parish No. 2 claim, as well as the opinion of the said court upon the final hearing, shows a complete ouster of plaintiff in error from its possession of said Parish No. 2 and the Lotta mining claims by the defendant in error.

In the opinion above referred to, the Trial Court states substantially:

> That if the defendant does not succeed in showing its title at the final hearing that it is assuming more responsibility in constructing the flume over and across the Parish No. 2 claim than the plaintiff;

clearly intimating that in an action of ejectment, if the defendant does not succeed in proving its title to the ground over which the flume was then being built, it will be compelled to vacate said property from which it had ousted the plaintiff. In fact, the plaintiff in error held its possession so vigorously that, as already stated herein, and as appears from the printed record in this case, the employees of the plaintiff in error were arrested at the instigation of the defendant in error in order that the defendant in error might complete its flume and dam on the Parish

No. 2 and Lotta mining claims. We state this merely for the purpose of showing a complete ouster.

This possession by plaintiff of the Parish No. 2 mining claim of which it was ousted by one not having any title thereto is of itself sufficient to maintain an action in ejectment and to be restored to such possession.

> "When neither party has a valid location possession is good title in the claimant."
>
> *Mor. Min. Rights*, 14 *Ed.*, 403 *citing*: *Protective Co. vs. Forrest City Co.*, 99 Pac. 103.
>
> "* * * the occupant has certain rights based upon the fact of actual possession, which, from motives of public policy, are accorded to him."
>
> *Lindley on Mines, Vol.* 1, *p.* 370, *Sec.* 216.

In support of the foregoing, Mr. Lindley quotes the foregoing from a California case, viz:

> "As against a mere trespasser, one in possession of a portion of the public land will be presumed to be the owner, notwithstanding the circumstance that the court has judicial notice that he is not the owner, but that the government is. This rule has been maintained from motives of public policy, and to secure the quiet enjoyment of possessions which are intrusions upon the United States alone."
>
> "A forcible and tortious invasion of such possession confers no privilege upon the invader,

and cannot be made the basis of a possessory title. A rightful seizen cannot flow from a wrongful disseizen."

Lindley on Mines, Vol 1, *p.* 371, *Sec.* 217.

"Possession of land by a plaintiff in trespass *quare clausum fregit* is *prima facie* evidence of title, and is sufficient for a recovery against trespasser."

Campbell vs. Rankin, 99 *U. S.*, 261; 25 *Law Ed*, 435.

Mr. Justice Miller in his opinion in the foregoing case states:

"The record sufficiently shows that neither party to this suit had any legal title to the *locus in quo* from the United States, and that only such possessory right as the Act of Congress recognizes in the locator and occupant of a mining privilege was in controversy."

"There is no possible ground upon which a plaintiff's title by adverse possession can be questioned by the defendant who occupies the attitude of a mere subsequent intruder without any title."

Newell on Ejectment, *p.* 720, *Sec.* 24.

We respectfully submit that we have clearly demonstrated that the uncontradicted evidence shows (1) that the Parish No. 2 lode mining claim was staked and marked upon the ground in the year 1899 and while the same was open and unappropriated public domain; (2) that discoveries of gold-bear-

ing mineral rock in place were made upon said claim prior to any intervening right or location by others; (3) that at the time of the trial there was no intervening mining location which would affect any discoveries made upon Parish No. 2 lode mining claim subsequent to the date of its location and the staking and marking of its boundaries; (4) that any testimony which attempts to prove that the discovery claimed by the plaintiff as having been made at the time the Parish No. 2 mining claim was located and upon which such location was originally based, is weakened and loses all its force and effect by reason of the admissions on the part of the defendant's witnesses that gold-bearing rock was, in fact, in place within the exterior boundary lines of said Parish No. 2 mining claim; (5) that both plaintiff and defendant claimed the same ground as mineral ground, each asserting its own independent discovery; and (6) that the annual labor was done and performed upon said Parish No. 2 mining claim each and every year from 1900 to and including the work for 1909 and 1910.

In view of all this, as already hereinbefore stated, the Judge of the Trial Court without any evidence whatever to support his findings held that there was no discovery and the ground was non-mineral in character and the annual labor had not been done for the years 1900 to and including 1908. How and why he arrived at such a conclusion is a mystery which we will not attempt to fathom or solve. It is true that he saw fit to visit the mining claims; but this

could only be for the purpose of enabling him to better understand the evidence submitted in the case.

Such view of the mining claim can not be used as independent evidence in the case. (22 Ency. Pl. & Pr., p. 1055.)

The object of the visit to the mining claim is not to furnish evidence upon which to found a verdict but to better understand and apply the evidence presented in court. (22 Eny. Pl. & Pr., p. 1055. See Groundwater v. Washington, 92 Wis., pp. 5-6.)

VI.

The plaintiff in error based upon findings of fact made by it and presented to the Trial Court and supported by all the evidence in the case, requested the making, signing and filing of conclusions of law Nos. 1 and 2 (P. R. pp. 1676-7) which, in substance, asked the court to conclude that the plaintiff in error was entitled to a writ of ejectment ejecting the defendant in error from the Parish No. 2 lode mining claim, and granting a restraining order restraining the defendant in error from in any wise interfering with plaintiff in error's possession of said Parish No. 2 lode mining claim.

The Trial Court refused to make such conclusions of law and the plaintiff in error has assigned such refusal as error.

We contend that from the uncontradicted evidence in this case that there was no alternative other than to grant the plaintiff in error the writ of ejectment requested in its findings presented to the Trial Court, as aforesaid.

VII.

The Court erred in that part of the judgment and decree where it adjudged and decreed as follows: "It is further considered, ordered and decreed that the plaintiff take nothing further by its complaint herein and except as to the Lotta lode mining claim, this cause and action be dismissed without cost to either side." (P. R. 93.)

In Section 514, p. 253 Carter's Alaska Code, costs are allowed as a matter of course to the plaintiff upon a judgment in his favor in actions for the recovery of the possession of real property or right to the possession thereof.

The plaintiff in error recovered judgment in this case for the Lotta lode mining claim and therefore is entitled to its costs as a matter of course.

Under this head we further contend that we have fully and amply shown that the action should not have been dismissed as to the Parish No. 2 claim and that the plaintiff in error was entitled to a judgment and decree restoring it to the possession of which it had been ousted.

VIII.

The Court erred in over-ruling the motion of plaintiff for new trial herein.

Motion for new trial was filed in the District Court for the District of Alaska, Division No. 1 in this case within the time required by law. (P. R. pp. 1[illegible]). The Trial Court overruled said motion

for new trial to which ruling plaintiff in error excepted. (P. R. p. 1694). This motion for new trial among other statutory grounds, set up that there was no evidence to support the findings of fact, conclusions of law and decision of the Trial Court and that said findings made by the Trial Court were contrary to the evidence and against all the evidence in said cause. (P. R. p. 1694).

As already argued in this brief, there is absolutely no evidence upon which the findings of the Trial Court could be based, and the motion for new trial should have been allowed.

It will fully appear to the Appellate Court that the only part of the judgment and decree of the Trial Court appealed from is that part affecting only the Parish No. 2 lode mining claim. The plaintiff in error served upon the attorneys for defendant in error and filed with the Clerk of the District Court of Alaska, Div. No. 1, a statement describing the parts of the record upon which plaintiff in error would rely and which it thought was necessary for consideration by the Appellate Court. (P. R. pp. 1 to 10).

The defendant in error filed its objections to the signing and certifying of the bill of exceptions prepared in accordance with the praecipe and the statement of plaintiff in error describing the parts of the record and the evidence which it considered necessary and upon which it would rely in prosecuting its writ of error. (P. R. p. 106).

The Trial Court thereupon made and entered an order sustaining the objections of the defendant

in error and refusing to sign and certify the certificate to the bill of exceptions prepared by the plaintiff in error for the reason "that said bill of exceptions does not contain a transcript of all the evidence in said cause." To which ruling of the Court the plaintiff was allowed an exception. (P. R. 104). The bill of exceptions and transcript of record upon which plaintiff in error relied are contained on pages 1 to 1132, both inclusive, of the record, excepting only the exhibits called for in plaintiff in error's praecipe and contained in Vol. V of the printed record herein.

We want to keep strictly within the record in presenting this brief to the Appellate Court. However, we do ask the liberty of making proof that since the trial of said cause application has been made to the U. S. Land Department for a patent to the Parish No. 2 lode mining claim, and that a formal protest was filed by the Government, which is usual in order to give an opportunity for examination by the Government through its special agent and to determine whether or not the land is mineral and that there is a discovery thereon and that said land is subject to location under the mining laws applicable to Alaska; and that since the filing of such formal protest the land has been examined by such special agent of the Government and the said protest has been withdrawn, which, in effect, is a declaration of the mineral character of the land.

If the Appellate Court should permit this proof,

we are ready and willing to furnish the same upon the oral argument of this writ of error.

We appreciate that this brief is long but in view of the fact that we are seeking to set aside findings of fact of the Trial Court, it became necessary to quote in substance the evidence introduced in the trial of this cause.

In conclusion, we have only to say that the plaintiff in error having presented its findings of fact and conclusions of law based absolutely upon all the evidence introduced before the Trial Court in this cause, that the same is tantamount to a request for judgment upon the pleadings and the evidence, and that the Appellate Court should reverse the Trial Court and issue its mandate requesting that judgment be entered in favor of plaintiff in error.

Respectfully submitted,

JNO. R. WINN and
N. L. BURTON,

Attorneys for Plaintiff in Error.

CONTENTS.

TABLE OF CASES.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH JUDICIAL CIRCUIT.

THE EBNER GOLD MINING COMPANY, a Corporation,
Plaintiff in Error,

vs.

ALASKA JUNEAU GOLD MINING COMPANY, a Corporation,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The facts of this case as presented by this record, in so far as they concern the merits of the writ of error, are few and simple.

The Alaska Juneau Mining Company, defendant in error, through its agents and employees, entered upon a tract of land through which Gold Creek flows, for the purpose of appropriating the water of that

creek for mining and other beneficial purposes. The Ebner Gold Mining Company, plaintiff in error, claimed that the entry was upon lands owned by and in possession of that company, to wit: the Lotta, a patented claim, the Parrish No. 2—claimed as an unpatented location—and the Cape Horn Lode claim, and brought ejectment to recover possession. The defendant in error denied the title of plaintiff in error to the Parrish No. 2 and Cape Horn Lode claims, asserting that the land upon which its entry was made was covered by valid subsisting locations called the Oregon and Canyon Lode claims (covering practically the same area as the Parrish No. 2), claimed by it through mesne conveyances from the locators. In constructing its diverting works the defendant in error originally placed a small part of the abutment of the dam on the patented Lotta Claim. But all the remaining works were on the area common to the Parrish No. 2 and the Oregon. The real controversy in the case was over the validity of the Parrish No. 2 and the Oregon and the rights of plaintiff in error set up in the second cause of action. Judgment passed for plaintiff in error as to the Lotta. The plaintiff in error voluntarily abandoned its claim of title to the Cape Horn.

The trial court found that neither the Parrish No. 2 nor the Oregon were valid mining claims; that there was no sufficient discovery upon which to predicate a location of either; that each was made purely as a mat-

ter of "convenience," and that at the time of the entry of defendant in error upon the land in question it was open public land, not in the possession of plaintiff in error. The Court thereupon ordered the second cause of action dismissed. From this order the writ of error is prosecuted.

It seems apparent from this statement of the case that unless it be affirmatively shown by plaintiff in error that there was no evidence to support these findings, or unless in the progress of the trial the court below committed some substantial error prejudicial to the plaintiff in error, the judgment of the court below must be affirmed.

ASSIGNMENTS OF ERROR.

With the exception of two or three instances where it is claimed that the court below in the conduct of the trial committed errors prejudicial to the plaintiff, the assignments of error are based upon either (a) the refusal of the court below to making certain findings of fact, as requested by plaintiff, (b) the making of the findings upon which the judgment rests. In other words, it is not contended that there was *no* evidence in support of the findings made by the Court, but it is contended that in the presence of a conflict the Court should have found the facts as claimed by the plaintiff.

Assignments of this character are valueless. Similar assignments were before this Court in the case of

Empire State Idaho M. & D. Co. vs. *Bunker Hill & Sullivan M. & C. Co.,* 114 Fed., 417, and it was there ruled that

> "it is very clear that these assignments are unavailing."

This effectually disposes of assignments V, VI, VII, VIII and IX.

The case was tried by the Court without a jury. The rule in cases of this character is stated by this Court as follows:

> "The case having been tried without the intervention of a jury, the Court's findings are conclusive of the question of fact unless it be that there is no evidence to support them. The rule is that the findings of fact of the Court whether special or general will not be disturbed if there is any evidence upon which such findings could be made."
>
> *Cook* vs. *Robinson,* 194 Fed., 753, 759.
>
> "Whatever conflict there is in the evidence was resolved against the plaintiffs by the Judge of the court below,—whose findings are in cases like the present always to be taken as presumptively correct, and unless an obvious error has intervened in the application of the law or some serious or important mistake has been made in consideration of the evidence, the findings should not be disturbed."
>
> *Thorndyke* vs. *Alaska Perseverance M. Co.,* 164 Fed., 657, 665.

The general rule as to this presumption in favor of the findings is well recognized. But as it may be contended that some distinction exists with reference to cases appealed from Alaska, we confine ourself to the citation of cases determined in this Court on appeal or error from the Alaska Courts. To the cases heretofore cited we may add the following decided by this Court:

McIntosh vs. *Price,* 121 Fed., 716, 717;
Moore vs. *Moore,* 121 Fed., 737;
Hemple vs. *Raymond,* 144 Fed., 796, 800.

The only pertinent inquiry to which we submit counsel for plaintiff in error should address themselves, is as to whether there was *any* evidence introduced to show lack of discovery on the Parrish No. 2. This inquiry seems to be studiously avoided in Plaintiff's brief. The case has been presented by them upon the theory that this Court can review conflicting evidence and determine its weight. The statement in the brief of plaintiff in error at page 39 subd. (a) that "we contend that it was shown upon the trial of this case by a great preponderance of evidence, if not by the undisputed proof" confirms this. As heretofore shown this Court will not weigh conflicting evidence but will accept the findings of the court below as conclusive.

I.

THE QUESTION OF DISCOVERY ON THE PARRISH NO. 2 CLAIM.

The pivotal question in the case was the discovery on the Parrish No. 2 and its sufficiency to support a location. It was a question aggressively fought on both sides.

We think our duty in the premises only requires us to point out that there was some substantial evidence of a total lack of discovery. This we proceed to do.

At no time during the trial did plaintiffs seriously urge that a discovery had been made by the locator of the Parrish No. 2 at any other point than the cut at the Borean pit. Their witness Ebner, the original locator of the Parrish No. 2, testified as follows:

> "A. Why the discovery on the Parrish No. 2, Mr. Shackleford, is just north of a pit, an old pit, that was there.
>
> "Q. The Borean pit?
>
> "A. The Borean pit and the bedrock stuck out in one place there and showed quartz—that was the discovery for the Parrish No. 2" (Trans., page 715).

In its brief, however, appellants refer (page 73) to various other discoveries which they claim were undenied. This contention is clearly not in accord with the evidence. All of these so-called discoveries were al-

leged to have been made on the southeasterly half of the Parrish No. 2 claim. Defendant's witnesses after an exhaustive examination of that portion of the claim, reported to the Court as follows:

TESTIMONY OF R. A. KINZIE, pages 765, 766, 767:

"Q. I am speaking now of the portion of the Parrish No. 2 lying between Gold Creek or the banks of Gold Creek and the southerly end line. What is the condition of that part of the claim with reference to there being any rock in place anywhere near the surface?

"A. The southerly end line?

"Q. Yes; I mean along where the Borean pit is.

"A. *That is entirely covered by rock slide in the southeast portion, all the way*—it is made up of two slides, one in the vicinity of Miller's Gulch and the other coming from a point on the north side of Snowslide Gulch.

"Q. How about the Borean pit—any rock in place anywhere in that vicinity?

"A. In the Borean pit itself?

"Q. Yes.

"A. No, there is not.

"Q. Do you know where that open cut is—the Borean pit?

"A. I do.

"Q. Is there any rock in place in the neighborhood of that open cut?

"A. I didn't see any.

"Q. Did you examine it?

"A. I did.

"Q. Answer the question whether there is or not.

"A. I don't think there is any bedrock within at least thirty or forty feet, if not more, of the bottom of the Borean pit itself (704).

"Q. Is there, Mr. Kinzie, any rock in place in the Borean pit, at the Borean pit or within a radius of 50 or 100 feet on each side of the pit?

"A. No, there is not—you mean to be seen?

"Q. Yes.

"A. No, there is not.

"Q. How deep, in your opinion, is the slide rock there?

"A. The slide rock, starting at a point—starting at Miller's Gulch and following along Gold Creek until you come to a point almost in front of the two Alaska-Juneau tunnels and then going straight south to the side line of the Colorado or very likely a little southeast from that point—the country above is entirely covered by slide rock.

"Q. To what depth?

"A. It is varying from a few feet, practically nothing at that point to I should judge, 50 to 80 feet (705).

"Q. To what depth is the country covered by slide in the vicinity of the Borean pit, in your opinion?

"A. From the topography of the country I would say it would vary from 50 to 80 feet."

SAME, pages 880, 881, 882:

"Q. Going back to your opinion as to the depth of the slide on the Parrish No. 2 lode claim at its

southeasterly end, when did you say you first made an investigation as to that slide?

"A. I don't believe I said.

"Q. When did you?

"A. I have known in a general way of the slide there for a long time. I went up there last Sunday to make sure, to look at it in detail.

"Q. Then, did you examine over every bit of that claim, say from the claim up the hill to the southeasterly end line of the Parrish lode No. 2?

"A. Why, I went up and down there three or four times, I think, virtually to the creek. There are two slides there and I was trying to follow out where the junction was."

TESTIMONY OF B. D. STUART, pages 976, 977:

"Q. What is the character of the rock in the Borean pit—anywhere in the Borean pit? I will change that. What is the character of the rock in the Borean pit, any place within 75 feet of that open cut in any direction, with reference to being in place or otherwise?

"A. Not in place—it is slide rock.

"Q. How deep in your judgment is the slide?

"A. I measured the depth of it yesterday, at that open pit—from the bottom of the open cut as it is now to the rim of the Borean pit on the south side, just up from the cut. It is between thirty and forty feet deep there, and the bottom of the cut is still in slide. There has recently been dug a hole in the bottom of that open cut.

"Q. How recently?

"A. Within a week, anyway—within a few days.

"Q. What did you find in the bottom of the hole?

"A. This hole uncovered some large loose boulders, but I could see down between the loose boulders and could see some drift material, I should say three feet below the bottom of the cut as it was made originally (898).

"Q. How large were those boulders?

"A. I should say they were a foot or two in diameter."

SAME, page 1226:

"A. I went up yesterday afternoon on my own initiative and re-examined the ground and did a little picking around there myself and some pick and shovel work underneath the boulder, and went up this morning and dug an open cut, what I considered about the level of the lowest part of the boulder, underneath the boulder for a distance of about seven feet horizontally from what would be the southerly side of the boulder, the one toward the open cut; that brought me almost under the centre of the boulder. Then I sunk or had sunk a little shaft about three feet wide and 4 feet long (1127), perhaps, and we sank down here until we got to a depth of from five to six feet beneath the lowest part of the boulder as it showed underneath. That little shaft was entirely in drift matter, drift material; the bottom of the boulder was plainly visible, however, and very distinct and plain —everything above it was a solid mass of rock and

everything beneath it was loose gravel and boulders of very heavy igneous character—they were granite boulders, pieces of granite and other rock that was entirely different from the boulder itself. As further evidence of being a boulder, when we got to the open cut underneath the entire mass gave evidence of breaking away from its position, and we had to timber it up in order to keep it from falling. I obtained samples from the bottom of the shaft."

TESTIMONY OF R. G. WHALEN, pages 1025, 1026:

"Q. Did you make an examination of the Borean pit?

"A. I did.

"Q. And the open cut shown in the pit?

"A. I did (943).

"Q. What did you find there in the way of open diggings in the Borean pit?

"A. It appears to be a large placer wash and on the south side, on the southeast side of that pit, there is apparently a trench or open cut dug in the wash. The boulders are piled up in the wall alongside of this to keep it from caving in apparently and in the bottom of that.

"Q. Did you find any evidence there of recent excavations?

"A. There was a hole I saw this morning that has been dug since I was there last time.

"Q. What, in your opinion, is the condition of the surface of that ground as to being in place or not?

"A. In my opinion that is slide rock.

"Q. How deep is the slide rock?

"A. From the condition of the ground there and from the outcrops further down I should judge it would be about twenty feet deep there.

"Q. Did you examine the bedrock where it shows in Snowslide Gulch and on the creek?

"A. I did.

"Q. How does the character of the bedrock at those points compare with the pieces of rock that protruded from the surface in the neighborhood of the Borean pit?

"A. It is entirely different from the boulders in the pit in the vicinity of this slide, with the exception of a few small pieces of loose rock that are somewhat similar.

"Q. I am speaking of the boulders that project from the surface and are apparently in a slide condition.

"A. It is entirely different from them" (944).

In addition to the testimony of expert witnesses showing that the ground on which plaintiff's discoveries were alleged to have been made was covered with slide rock to a depth of from twenty to fifty feet, the trial judge was able to support his findings by his personal conclusions reached after a view of the premises in dispute under guidance of an expert from each side. These experts pointed out to the Court the matters and things referred to in the testimony by the various witnesses. It was expressly stipulated (transcript, page 1888), that the fact of this visit should be included in the record of the case and sub-

mitted to the Circuit Court of Appeals as a part thereof.

The foregoing excerpts from the evidence unquestionably show that not only was there a conflict in the evidence as to the existence or non-existence of a discovery to support the Parish No. 2 location, but that the preponderance of the evidence as well as the Judge's personal conclusions based on his own examination of the property, support the findings. This case is clearly within the rule which prohibits the Circuit Court of Appeals from reviewing these findings of fact further than to determine that a conflict in evidence exists.

In the case of *McIntosh* vs. *Price,* 121 Fed., 716, 717, a case somewhat similar to the one at bar, this Court held that the testimony of one opposing witness was sufficient to establish the existence of a conflict, and under such circumstances the findings would not be disturbed.

In the case at bar there is much cumulative testimony of a convincing character which supports the finding of lack of discovery.

II.

ANNUAL LABOR PRIOR TO 1909.

The Court having determined that the location of Parrish No. 2 was invalid by reason of a lack of discovery, it would seem apparent that the question of the annual labor became an immaterial one, and the

rulings of the Court in this behalf, if erroneous, were not prejudicial to plaintiff. No location having been properly made, in the first instance for lack of discovery, no amount of annual labor could validate it. A failure to do this work therefore could not work a forfeiture of something which never existed.

The issue, however, was before the Court. It was tendered by the plaintiff in his opening testimony and rebutted by the defendant, and, of course, as neither party could forecast the ruling of the Court on the question of the validity of the Parrish No. 2 location, the issue was tried and a finding made. We think in the light of the Court's finding of a total lack of discovery in the Parrish No. 2, everything in the record on the subject of the annual labor became immaterial. But as plaintiff in error assails the finding we are at liberty to discuss it.

The sixth finding of the trial court was to the effect that no assessment work required by law to the extent of $100 each year was performed or caused to be performed in labor and improvements of any kind or for the benefit and use of said Parrish No. 2 claim prior to the year 1909. To this finding plaintiffs in error strenuously except. The reason for their objections will be apparent if we examine the Act of March 2, 1907, wherein Congress provided that upon failure to perform assessment work during any given year mining claims in Alaska become absolutely open to "location by others as if no location of the same had

ever been made." Under this statute there can be no saving of locator's rights by resumption of work prior to the intervention of other parties. Where the statutory period has elapsed for doing assessment work, *ipso facto,* the former location becomes invalid. This construction of the act has been expressly upheld and its effect compared with that of Section 2324 Revised Statutes in the case of *Thatcher* vs. *Brown,* 190 Fed., 708, 711.

In that case, which came to this Court on appeal from Alaska, Judge Ross said:

> "Both acts expressly require $100 worth of work or improvements to be done or made on or for the benefit of each claim during each year. But the consequences of a failure to complete such work or improvements within the year are differently declared, and such differences are irreconcilable. In the earlier act such failure is not declared to end the locator's right; but he is thereby given the right to resume the work after the expiration of the year, provided there has been no other location meanwhile. By the later act no such permission is accorded, and there is therein an express declaration that such failure works a forfeiture of the claim. To that extent the prior law, so far as it affects claims in Alaska, was necessarily repealed by the later one."

If, therefore, the findings of the trial court on the question of non-performance of annual labor prior to 1909 are conclusive, plaintiff's location of the Parrish

No. 2, made in 1899, even if valid in other respects, lapsed shortly after its initiation owing to non-performance of assessment work. Whatever right plaintiff may have had to reinstate the location by resumption of labor was effectually terminated in 1907 by the Act of March 2nd of that year. We need not discuss what would have been the effect of plaintiff's resuming work prior to that year without relocating. It is sufficient that they did not resume it. There being no location to support their attempted resumption of annual labor in 1909, these attempts were, of course, ineffectual for any purpose.

Plaintiff in error characterizes the finding of the Court that the annual labor on the Parrish No. 2 claim was not done in 1907 and 1908 as "arbitrary, inconsistent and unreasonable, and unsupported by any evidence whatsoever in this case" (brief of plaintiff in error, page 106). As in the case of the discovery question, it is needless to say that the record does not bear out this harsh criticism of the Court.

Some evidence was offered that during various years some work had been done looking toward the doing of assessment work, consisting of permitting the water to flow through the Borean pit, the construction of ditches and trails across the claim for the benefit of other claims and the like, but it was shown that in 1910 there were no evidences upon the ground that any work had ever been done, except probably the driving of a very small tunnel near the Gold Creek Canyon

(testimony O. M. Harry, transcript, page 1006). Witness R. A. Kinzie testified (transcript, page 795), that he was on the ground covered by the Parrish No. 2 lode claim in August, 1910, that there was no one in possession then except O. M. Harry, an employee of defendant, and no sign of a habitation, building, or construction of any kind on the ground. In addition to this the trial judge viewed the ground in dispute, as hereinbefore stated, and was able to see for himself how much labor had actually been performed on the Parrish No. 2 claim. Thus it will be apparent that there was at least a conflict in testimony as to whether assessment work had been done, and in view of this conflict the Court's findings must be conclusive here. However, the finding was upon an issue which became immaterial by reason of the decision of the Court on the question of discovery. If there was any error committed it was in no sense prejudicial.

III.

POSSESSION.

Failing to establish any legal title in itself to the Parrish No. 2 Claim such as would properly support an action in ejectment, plaintiff in Part V of its brief on appeal, falls back on the principle of *pedis possessio* as justifying its case. Counsel avers that even if plaintiff had no title to the ground in controversy, that it was in possession and was ousted from possession by

defendant, and therefore entitled to maintain ejectment.

This argument also is met by the findings of the trial court. The fifth finding in part reads:

> "That the plaintiff *is not and never has been* seized, *possessed* or *entitled to the possession* of that certain tract of ground described in paragraph 3 of the plaintiff's second cause of action, set forth in the amended complaint herein, and known and referred to as the Parrish No. 2 lode mining claim" (Transcript, page 87).

Again, in paragraph seven the Court finds:

> ". . . and that at the time of said location and erection of said dam and flume and the diversion and appropriation of said water, the said property so described as the Parrish No. 2 lode mining claim was a part of the *unoccupied, unsegregated* public domain of the United States" (Transcript, page 89).

These findings as to the condition of the ground at the time of defendant's entry thereon are conclusive and binding on this Court, on the authority of the cases heretofore cited. Moreover, they are amply supported by the testimony of O. M. Harry, who made the first entry on the ground for defendant, being employed to start the preliminary work toward construction of the dam and intake. We cite from his testimony:

TESTIMONY OF O. M. HARRY, Transcript, pages 1006, 1007:

"A. I went up on August first and looked the claim all over as much as I could that day, to see if there had been any assessment work done on it and I didn't find any; then I came down to the present location of the cabin, cleaned off (925) some brush there in case I sent some one up there to start the work, so they would know where to start the cabin and started a short piece of trail up the creek. That was on August first. August third I went back to the present location of the cabin and up the creek, cut some steps up the bank, towards where the present location of the flume is, with a view to getting around up to where the dam now is located, and I started up along the bank and it was too hard for me to get around that way, and I went up on top of the hill over the road and went around south of the present dam site and cut a piece of trail where the dam is now. I went up and put in some boards in there to change the water, to wash the gravel off, as I was told to clean out everything there and get everything ready to start the dam at a point lower down, and I went down and cleaned out tree-tops and boards and some rocks and threw them into the creek.

"Q. At what point?

"A. At about where the dam is now, and I got through that day and started to come down the flume-line to come to Juneau, and I saw a hole in the bank on the south side of the creek that looked like a tunnel, and I went over and examined that.

While I was examining the claim on the first, this being down right under the cliff, I did not see it, but on the third I saw this hole and went over and went into it.

"Q. Now, describe to the Court the apeparance of that tunnel with reference to age and marks.

"A. It was grown with grass and weeds and bushes and moss and didn't look like there had been anything done in it for some time" (926).

SAME, page 1008:

"Q. What age did this appear to have since work had been done on it?

"A. I don't think by the looks of the tunnel there had been anything done in the inside for a couple of years."

SAME, page 1011:

"Q. While you were doing this work up there were you interfered with at any time?

"A. No, sir."

SAME, pages 1013, 1014:

"Q. Was there any sign of habitation on the ground below the present dam site when you went up there?

"A. No, sir" (932).

"Q. Where anybody could live?

"A. No.

"Q. Or occupy the claim 24 hours in the day?

"A. No, sir.

"Q. Was there a blacksmith-shop or a structure

at the mouth of the tunnel that you have been speaking of when you went up there?

"A. Not when I went up there. There was later on.

"Q. Any sign of one?

"A. No."

We think it unnecessary to argue the legal refinements of the rule of *pedis possessio,* as plaintiff in error has absolutely failed to establish by the Court's findings or the evidence that it was in possession of the ground in controversy at the time of defendant's entry.

Since counsel has cited two cases in support of his contention, however, we note that neither decision applies to the case at bar. In *Protective Mining Co.* vs. *Forest City Mining Co.,* 99 Pacific, 1033, it was *admitted in the pleadings* that the plaintiff was in actual peaceable possession, and in *Campbell* vs. *Rankin,* 99 U. S., 261, the trial court *refused to admit evidence* of the plaintiff's possession and a new trial was ordered to determine this point. In the case at bar, plaintiff's alleged possession was denied in the pleadings, and although ample opportunity was afforded for proof of such occupancy on trial of the cause, plaintiff absolutely failed to establish its case in this respect, and the Court so found.

IV.

THE LOCAL CUSTOMS IN THE HARRIS MINING DISTRICT AS TO ENTRY UPON UNPATENTED MINING CLAIMS FOR PURPOSE OF APPROPRIATING WATER.

The testimony clearly shows that there was a custom prevailing and generally observed in the Harris Mining District, which permitted an entry upon an unpatented mining claim by one seeking to appropriate water flowing through it.

(See testimony of Bullard, transcript, page 1072; Hartrader, page 1082; Boyle, page 1090; Tracy, page 1100; Morse, page 1106; Kennedy, page 1112; Moore, page 1117; Hudson, page 1155; Kinzie, pages 1171, 1181; Marks, page 1175; Miller, page 1211; Wells, page 1215; Lockhardt, page 1218; Howell, page 1222).

This custom was set up by defendant in error as an additional defense. If the Court had found that the Parrish No. 2 was a valid subsisting mining claim, the question of the validity of this custom, as conferring the right upon defendant in error to enter upon the claim for the purpose of appropriating the water of Gold Creek would be an important one. Upon the record here presented, however, the question is unimportant and academic. The Court having found that at the time of the entry of defendant in error there was no valid subsisting mining claim, the question of the validity and effect of the custom became immaterial,

and the action of the Court in permitting the defendant in error to plead and prove the existence of the custom and the finding that such custom existed, was of no serious moment. If it was error it was harmless and non-prejudicial.

There is much to be said in favor of the validity of the custom.

The location of a mining claim in Alaska is not an appropriation of the water running through it. Riparian rights to water do not exist in Alaska.

Van Dyke vs. *Midnight Sun M. & D. Co.*,
177 Fed., 85.

A rule which would permit locators to cover the entire banks and beds of the mining streams by attempted locations of the character of the Parrish No. 2, without attempting to appropriate and use the water, and excluding all others from making such appropriation would be a serious matter.

However, we do not think upon the state of the record we are called upon to sustain the validity of the custom. This important question had best be reserved for consideration in a case where it is directly and necessarily involved.

The foregoing argument covers the principal points raised by plaintiff in error's brief, viz: the question of discovery, assessment work and actual possession of the alleged Parrish No. 2 claim, and defendant's rights under the customs of the Harris Mining District.

We will treat briefly the remaining points raised by plaintiff which are entirely on questions of procedure and, as we shall demonstrate, do not show any reversible error in any event.

V.

ALLEGED INCONSISTENCY IN ANSWER.

Plaintiff in error specifies that the trial court denied its motion to strike certain portions of defendant's answer and thereafter overruled a demurrer to those portions. The parts of the answer objected to, set forth first an affirmative defense, in the alleged ownership by defendant of the Oregon and Canyon claims conflicting with the Parrish No. 2, and, second, a right, regardless of the ownership of the ground in dispute, under the customs of the miners to carry water across the Parrish No. 2. These defenses are clearly not inconsistent. Defendant said, in effect: "We allege and "expect to prove that we own the disputed ground, "but if the Court should find against us on this, we "still claim the right to divert and carry water across "it for mining purposes, regardless of ownership." If defendant owned the ground, of course it could build a flume across it; if it did not own it, it still had the right to build a flume under the miners' customs. The trial court having found against both plaintiff and defendant on the question of ownership, plaintiff in error can not claim that it was injured by the allegation of that defense.

VI.

AMENDMENT OF ANSWER AFTER TRIAL.

Plaintiff in error alleges that the trial court erred in permitting defendant to amend its answer after trial of the cause but before final submission. In the first place the amendment was made so as to allege more specifically the forfeiture of the Parrish No. 2, a fact which was proven on trial of the cause. Plaintiff's case was not prejudiced by such amendment in the least, for the entire issue is now immaterial. In the second place, if plaintiff's counsel was in any degree taken by surprise by this amendment, the record does not show that he applied for leave to reply or asked for a continuance of the case, or moved to re-open the cause for the admission of additional evidence. Such being the case the allowance of this amendment by the Court was clearly within the provisions of Section 92, Part IV, Carter's Code, providing that pleadings may be amended after trial and before the cause is submitted:

> "When the amendment does not substantially change the cause of action or defense *by conforming the pleading or proceeding to the facts proved.*"

VII.

CONCLUSIONS OF LAW NOT ERRONEOUS.

Plaintiff in error further specifies that the conclusions of the Court from the facts found were erroneous. In arguing this proposition, however, counsel ignores the findings and says that the conclusions were against the evidence. This is, of course, no argument at all. In order to attack the Court's conclusions of law, counsel must assume the findings of fact as correct and show that the Court drew wrong conclusions therefrom. Having found that plaintiff had made no discovery on the Parrish No. 2 claim and that assessment work had not been done prior to 1909, there can be no question but that on the basis of such findings the Court was perfectly correct in concluding that the location was void and of no effect.

VIII.

COSTS.

Plaintiff in error claims that costs should have been awarded to it because it obtained judgment for restitution of the Lotta claim. Counsel cites Section 510, Part IV, Carter's Code, as authority for this claim. The section in question provides that plaintiff shall be allowed costs as, of course, upon a judgment *in his favor.* In the judgment in the case at bar (Trans.,

page 93), the Court holds, after granting the writ as to the Lotta claim:

> "It is further considered ordered, adjudged and decreed that the plaintiff take nothing further by his complaint herein, and except as to the Lotta lode mining claim this cause and action *be dismissed* without cost to either side."

It is difficult to see how counsel can construe the above language as constituting a judgment in plaintiff's favor, especially in light of the appeal to this Court. The writ of error was sued out to reverse the judgment of the trial court against plaintiff in error dismissing the cause as to the Parrish No. 2 claim (petition for writ of error, Trans., p. 124), wherein costs were awarded to neither party.

IX.

NEW TRIAL.

In its eleventh specification of error plaintiff in error sets forth that the trial court erred in overruling plaintiff's motion for a new trial.

This specification was not a proper assignment of error and can not be considered by this Court. It has been repeatedly held that an order of court overruling a motion for new trial is not reviewable on writ of error.

> *Loveland on Appellate Jurisdiction,* Sec. 56;
> *Moore* vs. *United States,* 150 U. S., 57, 61;

Blitz vs. *United States,* 153 U. S., 308, 312;
Railway Company vs. *Heck,* 102 U. S., 120.

Hence this specification may be dismissed without further comment.

Upon the case as presented by the record we respectfully submit that the judgment should be affirmed.

CURTIS H. LINDLEY,
Attorney for Defendant in Error.